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FEDERAL TRADE COMMISSION REAUTHORIZATION

HEARINGS

BEFORE THE

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION UNITED STATES SENATE

NINETY-EIGHTH CONGRESS

FIRST SESSION

ON

REAUTHORIZATION OF THE FEDERAL TRADE COMMISSION

MARCH 16, 17, AND 18, 1983

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FEDERAL TRADE COMMISSION REAUTHORIZATION

WEDNESDAY, MARCH 16, 1983

U.S. SENATE,
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION,
Washington, D.C.

The committee met, pursuant to notice, at 9:32 a.m., in room 253, Russell Senate Office Building, Hon. Bob Packwood (chairman of the committee) presiding.

Staff members assigned to these hearings: Lawrence R. Fullerton and Marilyn S. Richmond, staff counsels; and Amy L. Bondurant and Loretta L. Dunn, minority staff counsels.

OPENING STATEMENT BY THE CHAIRMAN

The CHAIRMAN. The committee will come to order, please.

As you are all aware, this starts the first of 3 days of hearings on the Federal Trade Commission authorization. I hope I'm not being too optimistic in referring to the hearings that way.

I hope we can get, at last, an authorization of some duration. I know that the Commissioners have no desire to come back here and then to the Appropriations Committee, and go over the same issues over and over. Nor do we enjoy going through them over and over, although I will be frank to say that as between a bad authorization for 5 years and a less bad or perhaps a good annual appropriation, I would accept the latter rather than the former, if that is what we were forced to.

I would like to think that I bend to no person on this committee in my efforts in deregulation. As I look back over the past 5 years at airlines, and trucks, and railroads, and all of the other areas of jurisdiction within this committee, I feel rather proud of what this committee has achieved in the passage of deregulation legislation. By and large I am rather proud of the way it has worked out.

But there is an area where I am less than enthusiastic about full deregulation. That is in the area where the bargaining power of the parties involved is not equal. There is nothing unusual in that. The common law has taken that position for the better part of its existence, both as it relates to children—we do not let minors enter into contracts almost under any circumstances—and when it relates to those parties that simply have disparate bargaining power when they are contracting.

I think the Federal Trade Commission has a long and honorable history of trying to protect consumers and those who are simply not in the position of equality. It is nobody's fault, but when it comes to the area of things like advertising, there is no way the consumer, if the advertising is unintentionally, let alone intentionally, deceptive, there is no way most consumers can fathom that. It is not their fault, and it is the job of the Federal Trade Commission to try to make sure that that kind of disparate access to information does not lead people to their disadvantage.

I am sure all of the Commissioners are familiar with the recent Harris poll that was published about the Government generally, and of course the answers were relatively routine. Harris said, "Do you want more or less Government regulation?" "Less" is clearly the answer. But then when you got down to some specific questions about advertising, about protection of consumers, and Mr. Harris asked the questions in a variety of ways, in almost every instance the bulk of the public wanted more protection in the area of consumer affairs.

I would hope that this committee and the Federal Trade Commission are willing to go hand in hand in expanding that protection.

At this point, without objection, I will place in the record an opening statement by Senator Hollings.

OPENING STATEMENT BY SENATOR HOLLINGS

Mr. Chairman, the Federal Trade Commission has an important mission to protect consumers against fraud and other abusive practices.

However, due to the belief that the agency was overstepping its mandate, the agency in the last decade has had an enormous amount of congressional attention—many oversight hearings and specific legislative direction through the FTC Improvements Act enacted in 1980. The FTC responded to this congressional activity and began to redirect its activities.

But I am now concerned that the current administration's attitude toward the FTC and the new FTC leadership's stringent requirements for regulatory analysis are leading to regulatory paralysis. I have heard, concern expresed by former critics that the agency is no longer fulfilling its core mission as the cop on the beat protecting against deceptive practices. I am happy to note that congress was able to keep the regional office structure intact but we need to be assured that the reduced field operation will keep the FTC a viable agency.

Last session, the reauthorization legislation did not become law. Thus we will be revisiting issues in these reauthorization hearings such as Federal regulation of the professions and statutory definition for "unfairnesss". I support a definition for "unfairness" and also believe that constitutional protection accorded to non-deceptive speech in advertising is threatened by the unbounded grant of "unfairness" authority. However, I have seen nothing to convince me that deception needs to be defined. I am concerned that such a standard would make it impossible for the Commission to bring suits necessary to keep the marketplace honest.

I also support, and am convinced that the public supports, the FTC's "Funeral Rule". This regulation will benefit a particularly vulnerable group, the elderly, and I hope the Commissioners will address this issue in their presentations to the committee.

I look forward to hearing the testimony on these and other important topics and hope to work closely with Chairman Packwood and Senators Kasten and Ford on the issues facing this committee.

The **CHAIRMAN**. Senator Kasten, we will go on first come, first serve.

Senator Kasten.

OPENING STATEMENT BY SENATOR KASTEN

Senator **KASTEN**. Mr. Chairman, thank you very much.

During the next 3 days of hearings on the reauthorization of the Federal Trade Commission, we will be addressing the merits of a number of proposals that have been advanced to clarify and to de-limit the FTC's legislative mandate. Most of these issues were raised and discussed during the 4 days of oversight hearings held before the Consumer Subcommittee last year.

These include proposals to define and limit the FTC's authority over unfair or deceptive acts or practices, to exclude commercial advertising from unfairness authority, to exempt or to limit Commission jurisdiction over professionals, to modify the Commission's authority to seek civil penalties under section 5(m)(1)(B) of the FTC Act, to repeal intervenor funding authority, and many others.

I, too, Mr. Chairman, look forward to the discussion and debate of these important and complex proposals. I share your hope that this year we will be able to reach a resolution of these issues not only in the Senate but also in the House of Representatives in a manner that is fair and that strikes an appropriate balance between consumer protection on the one hand and Federal regulatory reform on the other.

I believe that most people favor less Government regulation. That belief, as you mentioned, Mr. Chairman, was confirmed by a recent Harris survey. While I recognize that there are certain areas where Government regulation is necessary and desirable to protect consumers, I believe Government can achieve its objectives not through expansive or broadened regulation, but through vigilant and well-focused attention to the fraudulent, the anticompetitive, and the unfair practices that are most likely to injure consumers and competition.

So I look forward to hearing from the Commissioners and from the representatives of the business and consumer community who will be presenting testimony before the committee.

Thank you.

The CHAIRMAN. Senator Inouye?

Senator INOUYE. Mr. Chairman, I hope that this hearing will be the first of many important steps toward the long-awaited authorization of this agency. I shall be sitting here today listening to and very interested in the views of the Commission as they relate to some of the matters that have caused much controversy in the Senate.

Thank you very much.

The CHAIRMAN. Senator Ford?

Senator FORD. I have no statement, Mr. Chairman. Thank you.

The CHAIRMAN. I might advise you as to our time problem this morning. I have read all of your statements in toto. We are going to have a vote very shortly after 11 o'clock on cloture on the jobs bill. There may be another vote on the cloture petition filed by Senator Kasten. This is one of those inevitable days where I fear he has a conflict of interest. He does have a minor matter on the Senate floor that is of some interest to him.

As much time as he has spent chairing the Consumer Affairs Subcommittee and focusing on the Federal Trade Commission, if he does have to leave the hearing today, understand that it is in no way a derogation those who are here. He does have another matter that he has spent weeks and weeks on that apparently may be coming to a head today. Maybe not; we do not know, but it may or may not be.

In any event, if you are ready to start, we will start with Chairman Miller.

STATEMENTS OF HON. JAMES C. MILLER III, CHAIRMAN, FEDERAL TRADE COMMISSION, ACCOMPANIED BY DAVID A. CLANTON; MICHAEL PERTSCHUK: PATRICIA P. BAILEY; AND GEORGE W. DOUGLAS, COMMISSIONERS

Mr. Miller. Thank you, Mr. Chairman.

My fellow Commissioners and I appreciate very much the opportunity to be here to discuss reauthorization of the Federal Trade Commission. We want to express our thanks for this committee's efforts to bring about a successful resolution of the many reauthorization issues. Nothing could be better for the FTC and the public we serve than to get reauthorization behind us.

Reauthorization is very time-consuming for individual Commissioners and staff; it is unsettling and disruptive of our activities. Uncertainty over our future has created anxieties in public and private sectors alike.

Now, Mr. Chairman, I have submitted a statement on behalf of the Commission as well as a statement on deception. With your permission, could we have those inserted in the record?

The Chairman. All of the statements will be in the record in their entirety.

Mr. Miller. Thank you, Mr. Chairman.

I would like to summarize briefly both of those statements, if I might.

Despite our diverse backgrounds, we are in substantial agreement on many controversial matters. These include several sections from S. 2499, last year's reauthorization bill.

First, a majority of the Commission supports defining "unfair acts or practices."

Second, a majority of the Commission supports repeal of the Commission's public participation funding authority.

Third, a majority of the Commission does not object to the concept of a cap on total civil penalties, although there is no consensus about the amount of such a cap.

Fourth, the Commission unanimously supports amending section 5(m)(1)(B) of the FTC Act to permit the defendant to challenge the legal basis for the Commission's prior order, thus codifying the U.S. District Court decision in United States versus Braswell.

Fifth, although there are differences of opinion over the legislative veto, a majority of the Commission does support renewal.

Sixth, the Commission agrees that a notice of proposed rulemaking should be issued only where it has reason to believe that the challenged conduct is prevalent in the industry.

Seventh, the Commission unanimously supports ending the automatic stay of Commission cease and desist orders pending appeal.

Eighth, the Commission unanimously supports extending civil investigative demand procedures to its antitrust investigations, a procedure which now only applies to its consumer protection activity.

Ninth, since other financial institutions which are subject to the primary jurisdiction of other Federal agencies have been removed from FTC jurisdiction, a majority of the Commission feels that it would be consistent to place credit unions which are regulated by the National Credit Union Administration on the same footing.

However, the Commission remains unified and steadfast in its opposition to several proposals contained in S. 2499 last year. First, it urges the committee to reject proposals by associations of professionals and their members to be exempt from FTC jurisdiction. This view is shared by the administration, by almost all editorial writers who have addressed the issue, and by a vast coalition of professional groups, consumer organizations, and State and local government officials.

Mr. Chairman, I do not think there is anything else that has taken more of the Commission's time and is of greater importance to the Commission than the professions issue. I can think of no other single matter that has more at stake for the consumers of our country than this professions issue.

Second, the Commission also unanimously opposes any further exemption for agricultural cooperatives. The provision adopted last year by the committee would nullify the Nation's carefully crafted Hart-Scott-Rodino procedures for this type of commercial activity. Moreover, it would impose undue delay on investigations of any conduct that is not outside the purview of the Capper-Volstead Act, and would affect several ongoing cases and investigations now before the Commission.

Finally, the Commission unanimously opposes exempting commercial advertising from the Commission's unfairness jurisdiction. We believe that legislation defining unfair acts or practices would provide adequate protection against the potential for excesses in this area.

Now, Mr. Chairman, if I could briefly address the proposal I have for "deception." As you know, Mr. Chairman, and members of the committee, I believe that deception should be defined by Congress, and I have a specific definition to advance. The rationale for defining deception is really quite simple. I believe that efficiency and equity both require that those subject to rules understand the rules.

Obviously, understandable rules increases the likelihood of compliance by both those that want to abide by the rules and those who do not. Importantly, fair play demands that rules be clear, whether these are rules for playing basketball or football or rules for communicating commercial messages. Rules about deception presently are not clear. Scholars of various political persuasions have pointed this out, and in my prepared separate statement I go into some detail quoting their findings.

Now some say that 45 years of jurisprudence on this issue have made the definition clear. But show me one simple statement of that definition. I have not found it. The best those who make this argument can show is a phrase that is repeated in several Commission decisions. That is, that deception is a statement that has a "tendency or capacity to deceive," but this represents little or no guidance. In fact, it is a tautology.

Perhaps they meant that FTC case law on deception reveals a consistent set of principles. If so, I fail to perceive this pattern; as do those affected by the Commission's deception authority.

I think this present situation is particularly inequitable. First, the Commission does not articulate its rules. Then, rather than rewarding good behavior, it punishes what it considers to be bad behavior. An analogy from the behavioral sciences comes to my mind. The Commission puts a pidgeon in a skinner box, practices adverse conditioning through a trial and error reign of terror, and just to make things interesting, it throws in a few random shocks from time to time. Is there any wonder, then, that so many affected by our rules are confused about their rights and obligations under the law?

Granted the need for a definition, it seems to me there are two questions: First, what should that definition be? And second, who should articulate it? The definition I advance is: this deception is a material claim that misleads consumers acting reasonably in the circumstances to their detriment, or that a representer knew or should have known would have been misleading.

The reasons why this definition would address the FTC's problems were discussed at some length before this committee last July 22, and of course I had a statement at that time, Mr. Chairman. I should note, however, that this definition first follows common law principles and the principles that have been articulated by the American Law Institute. Second, the substance of my definition appears to be supported by the three Commissioners who oppose my initiative as appropriate criteria for case selection.

Finally, who should articulate that definition? Of course, the FTC could articulate the definition, but I believe that Congress is the more appropriate forum for such an articulation. The FTC could change that definition, responding to mere whim, and I believe that in a representative democracy it should be elected officials, not unelected bureaucrats, who determine policy.

Thank you, Mr. Chairman.

[The statements follow.]

STATEMENT OF HON. JAMES C. MILLER III, CHAIRMAN, FEDERAL TRADE COMMISSION

Mr. Chairman and members of the committee: I'm delighted to present this statement on behalf of the Federal Trade Commission.

First, let me say that my fellow Commissioners and I are very very pleased to be here to discuss reauthorization. We hope that the legislative process will soon culminate in a bill, signed by the President, that puts the Commission back on solid footing, safe from the slippery, tentative circumstances of a continuing resolution.

PROPOSALS SUPPORTED BY THE COMMISSION

Let us examine in particular the bill you reported last year, S. 2499.

Unfair acts or practices (section 2).—A majority of the Commission supports defining "unfair acts or practices" as the term appears in section 5 of the FTC Act. Specifically, we endorse the definition contained in last year's bill, as it tracks the protocol first articulated by the Commission in its letter of December 17, 1980 addressed to Senators Danforth and Ford.

Public participation (section 4).—A majority of the Commission supports repeal of the Commission's authority to fund participants in trade regulation rulemakings under section 18(h) of the FTC Act. This program has not been funded since President Carter's fiscal year 1981 budget, and retention of this authority does not seem warranted.

Maximum penalties (section 5).—A majority of the Commission does not object to the concept of a cap on total civil penalties. However, there is not a consensus over the amount of such a cap.

Knowing violations of orders (section 6).—The Commission unanimously supports this provision codifying the U.S. District Court decision in *United States* v. *Braswell.*

Allowing a defendent to challenge a Commission order under section 5(m) (1) (B) originally entered against another party makes good sense. However, the Commission unanimously opposes repeal of section 5(m) (1) (B).

Legislative veto (section 7).—Although there are differences of opinion over this form of Congressional oversight, a majority of the Commission does not object to its renewal.

Prevalence (section 9).—The Commission agrees that we should have good, firm evidence that a problem in an industry is not merely sporadic before initiating a rulemaking proceeding. Legislative guidance specifying the elements required to establish prevalence is desirable.

Effective date of orders (section 10).—The Commission unanimously supports this provision, placing the FTC on a par with other agencies when issuing orders to cease and desist unlawful conduct. We believe this would reduce the incentive to file petitions for review simply for dilatory purposes.

Civil investigative demands (section 11).—The Commission unanimously supports this provision. It would extend civil investigative demand (CID) procedures to the Commission's competition mission, placing it on a par with the Commission's investigative authority with respect to consumer protection matters.

Credit unions (section 15).—In principle, the Commission believes that all commercial activities should be subject to FTC law enforcement. However, since other financial institutions which are subject to the primary jurisdiction of other federal agencies have been removed from Commission jurisdiction, a majority of the Commission feels that it would be consistent to place credit unions, which are regulated by the National Credit Union Administration, on the same footing.

PROPOSALS OPPOSED BY COMMISSION

While several reauthorization proposals are supported by a majority of the Commission, others are opposed altogether.

Following markup of S. 2499 last year, the Commission wrote chairman Packwood, expressing "deep concern about three special exemptions" contained in the bill. That letter, dated May 27, 1982 (copy attached), delves at length into reasons why exempting associations of professionals and their members from FTC jurisdiction, exempting mergers of agricultural cooperatives from the FTC's competition jurisdiction, and exempting commercial advertising from the FTC's unfairness jurisdiction are each bad public policy and bad law.

The Commission remains unified and steadfast in its opposition to those provisions.

Professions' exemption.—The Commission urges the Committee to reject proposals by associations of professionals and their members to exempt them from FTC jurisdiction. This view is shared by the administration, by almost all editorial writers who have addressed the issue, and by a vast coalition of professional groups, business groups, consumer organizations, and state and local government officials. We applaud the Senate's action last year in rejecting such an exemption by an overwhelming vote of 59-37, and we respectfully petition the committee to reconsider the position it took on this issue last year.

Agricultural cooperatives' exemption.—The Commission also unanimously opposes any exemption for agricultural cooperatives. The provision adopted last year by this committee would nullify the Nation's carefully crafted Hart-Scott-Rodino procedures for this type of commercial activity.

Commercial advertising exemption.—Finally, we unanimously oppose exempting commercial advertising from the Commission's unfairness jurisdiction. We believe that legislation defining "unfair acts or practices" would provide adequate protection against future excesses in this area.

In addition, some members of the Commission oppose other provisions in S. 2499.

Mr. Chairman, the members of the committee: This concludes my statement on behalf of the Commission. My colleagues and I shall be happy to address any questions you might have.

Attachment.

Federal Trade Commission,
Washington, D.C., May 27, 1982.

Hon. Bob Packwood,
Chairman, Committee on Commerce, Science, and Transportation,
U.S. Senate,
Washington, D.C.

Dear Mr. Chairman: We are writing to express the Commission's deep concern about three special exemptions contained in S. 2499, recently adopted by the Committee.[1] Our letter contained addresses the Committee's actions to: (1) exempt State-licensed professions from the FTC's jurisdiction; (2) exempt commercial advertising from the Commission's unfairness jurisdiction; and (3) exempt mergers of agricultural cooperatives from the Commission's competition jurisdiction. If legislation containing these provisions is enacted, these special exemptions will cause substantial injury to consumers and to our nation's economy.

STATE-LICENSED PROFESSIONS

The bill approved by the committee would grant individual professionals who are licensed at the state level, as well as their private professional associations, total immunity from FTC law enforcement. As a result, the Commission would be barred from investigating the most clear-cut and egregious violations of the antitrust and consumer protection laws, simply because these violations were committed by licensed professionals. Price fixing, boycotts, false advertising and other conduct proscribed by federal law would be shielded from FTC challenge, even if the activities in question were totally unregulated by the State.

Proponents of the special exemption have presented several arguments to support their view that an exemption for professionals from the Commission's law enforcement authority is both necessary and appropriate. The Commission believes that these arguments are riddled with inconsistencies as well as distortions of the FTC's enforcement activities, and we would like to take this opportunity to present our response.

First, proponents claim that this special exemption for professionals is nothing more than an effort to preserve State sovereignty and promote federalism. Yet, at the same time, they suggest that the exemption will not leave professional activities unreviewable by the Federal Government, as the Department of Justice will retain its authority to prosecute violations by professionals. If antitrust enforcement by the Department of Justice is relied on to support this exemption, proponents of the provision cannot seriously claim that it is sought in the interests of federalism. Indeed, this argument suggests that the ultimate goal is a blanket exemption for professionals from the antitrust laws. Further, the Department of Justice has no consumer protection authority comparable to that of the FTC. Hence, the benefits gained by Commission initiatives in the consumer protection area would be lost altogether.

The Commission also believes that proponents of this special exemption have distorted the concept of federalism. The basic tenets of federalism seek to accommodate both state and Federal interests. In this, as in other areas, our national policy favoring free enterprise, competition and informed consumer choice can and should coexist with state regulation.

Another argument made to support the exemption for professionals, presented frequently by certain sectors of the health care industry, is that Commission enforcement initiatives in the health care field interfere with traditional state laws and regulations governing delivery of services and quality of care. This argument overstates and thereby distorts the scope and intent of Commission activities in two significant ways.

First, while states traditionally have regulated certain aspects of the health care industry, state regulation has been directed primarily at licensure requirements, scope of practice questions, and other so-called quality of care issues. The FTC, on the other hand, has examined the practices of health care and other professionals in the conduct of their business affairs. These so-called business practices—as distinguished from quality of care or "scope" of practice—include virtually the same types of activities as are engaged in by all other businesses, large and small, such as debt collection, advertising, contracting for goods and services, and the determination of fee schedules, office locations, hiring practices and the like. It is the illegal business practices of professionals that the Commission seeks to prohibit. Because virtually the same business practices—legal and illegal—are engaged in both by professional and non-professional business establishments, there is no valid reason for arbitrarily immunizing the anticompetitive and/or deceptive practices of the former group from FTC scrutiny and prosecution.

A second important distinction which should be made is that most FTC investigations and prosecutions involving the professions have challenged not state laws or regulations, but rather illegal conduct by private parties. With only one exception, the FTC has sought to prosecute private parties for illegal business practices or conduct not reached by state statutes or regulations. No reason has been advanced to justify a rule of law that would prohibit the Commission from investigating such allegedly anticompetitive or deceptive business practices simply because they are engaged in by doctors, dentists, ophthalmologists, or other professionals. In the one instance where the FTC has challenged the enforcement of state law or regulation, it has acted only after compiling substantial evidence of the existence of widespread and significant consumer injury without offsetting benefits for consumer health care delivery.

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[1] Individual Commissioners have expressed, or may express in the future, separate views to the committee on other provisions of S. 2499.

Mr. Chairman, in addition to explaining our objections to the arguments that are raised continually in support of this special exemption for professionals, we would like to address other critical concerns we have.

The outer reaches of the exemption are as yet unclear. The definition of "professional" contemplated by the bill's proponents includes a broad range of groups and may insulate literally hundreds of occupations from FTC scrutiny. At the very least, this legislation would remove activities involving hundreds of billions of dollars in commerce from Commission law enforcement efforts, to the serious detriment of the public and our economy.

The law enforcement activities that will be halted if this bill is enacted are among the most significant and beneficial of the agency's efforts.[2] Our enforcement activities have challenged collusive private conduct by professionals interfering with interstate commerce, such as price-fixing conspiracies, group boycotts, and suppression of truthful advertising. The Commission has acted, for example, to prevent physician groups from engaging in group boycotts designed to thwart the development of health maintenance organizations,[3] and to prohibit dental associations from organizing boycotts intended to obstruct insurers' cost-containment programs.[4]

A commission proceeding involving medical association codes which ban truthful advertising by physicians provided evidence that such private codes have been used by professional associations for a variety of anticompetitive purposes. (The Second Circuit Court of Appeals upheld the Commission's complaint in this case, and the Supreme Court recently affirmed the decision.[5] Such codes have been used, for example, to block a church organization from publicizing a low-cost cardiac stress clinic, to stop doctors from advertising their willingness to make house-calls, and to deny information to older Americans about which doctors would accept Medicare reimbursement as full payment.

In addition, the Commission has challenged deceptive advertising by professionals, such as physicians who failed to disclose the health risks associated with synthetic hair implants,[6] and has examined the effects of restrictions on the business practices of professionals, such as prohibitions on locating a professional practice in a shopping center or restrictions on working for a corporation that is not owned by professionals.[7] These FTC inquiries are designed to determine whether certain restrictions impose significant costs on consumers without any corresponding benefits.

Our "Eyeglasses" proceeding is an example of how competition promoted by Commission action benefits consumers. Before the Commission's Eyeglasses Rule[8] became effective in 1978, statutory and professional code restrictions in many states prohibited advertising on eyeglass and contact lens costs, thus preventing the free flow of information about such costs.[9] The Commission's Rule permitted providers of eyeglasses and contact lenses to compete through cost and service advertising. Consumers have benefitted in two ways. In the short run they have been able to comparison shop for the best prices. Over the longer run, they have benefitted from reduced prices brought about by advertising. As an example, the average price for soft contact lenses at the time the Eyeglasses Rule took effect in 1978 was $256. By

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[2] In many of the areas described below, the Commission has obtained consent agreements. Enforcement of these existing agreements also would be halted by this exemption, to the detriment of the American consumer.

[3] Medical Service Corp. of Spokane County, 88 F.T.C. 906 (1979); Forbes Health System Medical Staff, 94 F.T.C. 1042 (1979); American Medical Association, 94 F.T.C. 701 (1979), aff'd, 638 F.2d 443 (2d Cir. 1980), aff'd by an equally divided court, 50 U.S.L.W. 4313 (U.S. Mar. 23, 1982).

[4] Indiana Dental Association et al., 93 F.T.C. 392 (1979).

[5] American Medical Association, 94 F.T.C. 701 (1979), aff'd 638 F.2d 443 (2d Cir. 1980), aff'd by an equally divided court, 50 U.S.L.W. 4313 (U.S. Mar. 23, 1982). See also American Dental Association, 94 F.T.C. 403 (1979); Broward County Medical Association, FTC File No. 811 0194, 47 Fed. Reg. 11,285 (Mar. 16, 1982), corrected, 47 Fed. Reg. 12,809 (Mar. 25, 1982) (acceptance of consent agreement).

[6] E.g., Terrance D. Lesko, M.D., 96 F.T.C. 73 (1980).

[7] Bureau of Consumer Protection, Federal Trade Commission, State Restrictions on Vision Care Providers: The Effects on Consumers 1-92 (1980).

[8] 16 C.F.R. § 456 (1982).

[9] 43 Fed. Reg. 23993-96 (1978) ("Eyeglasses Rule" statement of basis and purpose).

1981, the average price had dropped to $204 (equal to $146 in 1978 dollars).[10] Virtually all industry observers attribute this startling decline to the FTC's Eyeglasses Rule and the competitive environment it created.[11] Thus, this Rule alone already has saved hundreds of millions of dollars for American consumers.

We cannot state in strong enough terms our opposition to the Committee's action. And, we are firmly convinced that professionals who do not engage in illegal conduct have no reason to seek this exemption. The bill would confer privileged status on one class of citizens—professionals—permitting them to avoid the basic tenets of our free market economy, competition and informed consumer choice.

UNFAIR ADVERTISING

The Commission also opposes the bill's exemption of commercial advertising from its jurisdiction over "unfair acts or practices." We believe that the Commission's unfairness authority, articulated clearly, should be applied across the board and that group who engage in otherwise prohibited conduct should not be singled out for special treatment.

Proponents of this special exemption argue that the breadth of the Commission's unfairness authority has created uncertainties for advertisers. However, the bill would amend the statute by providing that the Commission may exercise its "unfairness" authority only when: (1) an act or practice causes substantial injury to consumers; (2) the injury cannot reasonably be avoided by consumers; and (3) the act or practice has no offsetting benefits.

In addition to this statutory standard, if it is enacted, Commission decisions also must conform with the Supreme Court's decision in *Central Hudson Gas Corp.* v. *Public Service Commission of N.Y.*, 447 U.S. 557, 564-566 (1980). There the Court held that, if commercial speech is neither misleading nor related to unlawful activity, the government may regulate it only if: (1) there is a substantial interest to be served by the regulation, (2) the regulation directly advances that interest, and (3) the restriction imposed by the regulation is no more extensive than is necessary. In addition, specific Commission actions and decisions always are subject to Congressional oversight. Despite these protections which insure against inappropriate Commission actions based on the unfairness authority, this section of the bill creates a total exemption, insuring no Commission action under this authority, no matter how helpful to consumers.

Finally, the exemption creates a substantial ambiguity about its scope by failing to define "commercial advertising." Because this term may be interpreted broadly, it is unclear whether the provision covers labeling, point-of-sale literature, oral sales presentations, etc. If "advertising" is interpreted to extend beyond media advertising, the exemption could limit the Commission's ability to protect consumers even further.

We believe that the Committee's decision to define statutorily the Commission's "unfairness" jurisdiction should eliminate any of the uncertainties that may have confronted commercial advertisers. Moreover, we are firmly convinced that Commission actions based on this authority will provide significant benefits to consumers. In our view, there is simply no reason to exempt any acts or practices that fall within the Committee's definition of "unfairness" from the Commission's jurisdiction.

AGRICULTURAL COOPERATIVES

Finally, the Commission objects to the Committee's amendment prohibiting the FTC from "conducting any study, investigation, or prosecution" of any Capper-Volstead agricultural cooperative "until the Secretary of Agriculture has made a final determination that the acts or transactions in question are outside the scope of the immunity conferred by the Capper-Volstead Act or section 6 of the Clayton Act."

In the Commission's view, this section of the bill seriously undercuts the ability of the Commission to enforce antitrust and consumer protection laws against agricultural cooperatives for conduct which is not from the FTC Act. First, the section creates a special administrative procedure for a narrow class of Commission respondents by entrusting in another agency the initial jurisdictional determination. Under current law, as is the case with other administrative agencies, the Commission makes the initial determination subject to review by the Courts. Moreover, this initial determination as set out in the bill, purporting to be binding on the Commission as an independent agency, is made by an official of an executive department, thus partially undermining the rationale for the creation of an independent Commission.

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[10] The source of these data is an annual consumer survey performed by Health Products Research, Inc., Morristown, New Jersey.

[11] See, e.g., Business Week, Nov. 5, 1981, at 125.

The procedure contemplated by this provision also insures a major delay in Commission proceedings by encouraging respondents wishing to avoid Commission enforcement to engage in lengthy appeals in the federal court system of the Secretary's initial determination. During this protracted litigation, which could easily take several years, no Commission investigation or court action could take place. Thus, any opportunity to remedy the harm caused to consumers or competition by the cooperative will be delayed for a substantial period. Moreover, this section virtually guarantees the Commission will be unable to seek immediate preliminary injunctive relief to prohibit unlawful mergers, to enjoin deceptive practices, or any other unlawful behavior engaged in by an agricultural cooperative. Consequently, this section undermines the intent of Section 13(b) of the FTC Act, reflecting a Congressional intent for the Commission to halt quickly unlawful behavior under appropriate circumstances.

Finally, the amendment could interfere with a proceeding currently in litigation in which it is alleged that a cooperative violated the antitrust laws by purchasing certain non-cooperative assets. In our view, there is no reason to so interfere with the Commission's adjudicative process.

CONCLUSION

Mr. Chairman, the Commission believes that the special exemptions included in this bill will dismantle the Commission's law enforcement authority with respect to three significant sectors of the American economy. The exemptions clearly have no justification in law or in fact, provide no benefits to consumers or competition, and plainly are contrary to the public interest.

For these reasons, we oppose the special exemptions included in this bill.

By direction of the Commission.

Sincerely yours,

JAMES C. MILLER III, *Chairman.*

SEPARATE STATEMENT OF HON. JAMES C. MILLER III, CHAIRMAN, FEDERAL TRADE COMMISSION

Mr. Chairman and members of the committee: As I have stated on other occasions, and indeed before this committee, it is my personal belief that the Commission needs legislative guidance to resolve the uncertainties regarding the meaning of deceptive acts or practices. A majority of the Commission has agreed that a more specific statutory standard would be appropriate for unfairness. I believe that deception, like unfairness, should also be statutorily defined.

Specifically, I have proposed that the Commission be required to find that the challenged act or practice is a material claim that misleads consumers, acting reasonably in the circumstances, to their detriment. Alternatively, the Commission could act upon a finding that the perpetrators knew or should have known that the act or practice was misleading, without the need for additional evidence of injury.

Mr. Chairman, although three of my fellow Commissioners may not agree that a statutory definition of deception is necessary, is notable they approve the substance of my proposal as case selection criteria. For example, in a letter to Senator Kasten, dated August 30, 1982, reprinted on page 63 of the Senate Commerce Committee Hearings on Deception, Commissioner Bailey stated: "I have said in the past that I agree with some of Chairman Miller's observations about the appropriate standards to be applied in the deception area for case selection purposes. Specifically, I agree that the Commission should not interpret advertising or other sales claims in an unreasonable manner by, for example, reading into the ad implied claims which were never intended to be communicated by the advertiser. Further, as a matter of prosecutorial discretion, I do not believe the Commission should take action where a claim would mislead only the most gullible. Finally, I agree that we should focus our resources on cases involving substantial consumer injury."

In a letter to Senator Kasten, dated September 23, 1982, and reprinted on page 50 of the same hearings, Commissioner Clanton stated: "I basically agree that Chairman Miller's proposal is a good test for case selection; in fact, the Commission has been using similar criteria for some time in determining what cases are worth pursuing."

And on December 13, 1982, in FTC oversight hearings before the House Committee on Energy and Commerce, Commissioner Pertschuk stated: "My concern is not that the Chairman's definition of deception is not one rational set of criteria for choosing cases. And I think, generally speaking, the Commission would choose it." (Hearings, p. 118.)

As it exists now, the case law on deception is extraordinarily broad. Although Congress acted wisely in not making Section 5 a laundry list of prohibited practices, the time has come to establish statutory criteria for deception. The present law gives virtually unlimited discretion to the Commission to declare an act or practice deceptive. This unguided discretion creates great ambiguity about how the law will be applied. Further, this discretion and ambiguity have resulted in decisions by the Commission that may have harmed consumers rather than helped them.

I am by no means the first to observe the lack of clarity in FTC law concerning deception. Many commentators and scholars have remarked on the unbridled discretion the Commission possesses, the lack of guidance provided by Congress and the courts, and the concomitant lack of certainty and predictability that results. For example, in their two-volume treatise, "The Law of Advertising," George and Peter Rosden note: "There is no doubt that neither the Federal Trade Commission nor the Legislature nor the courts of review have set a standard of perception that permits the advertising community or even their lawyers to predict with a reasonable percentage of probability whether or not a proposed advertisement complies with the law." (Vol. 2, 1976, Section 18, at 35.)

In their "Summary of Substantive Law Concerning Deceptivity, Truth, and Untruth," they conclude: "It has been said sometimes, and not without a measure of truth, that an advertisement is deceptive if the Federeal Trade Commission calls it so. This situation, unusual as it is in American jurisprudence, is due to a combination of reasons. In the first place, Congress has not seen fit to set legislative standards that have an ascertainable degree of definiteness. Nor has Congress written standards into the Act after several decades of administrative and judicial ad hoc interpretations. In the second place, a number of panels of courts of review have shown an inordinate degree of deference to the findings made by the Commission. This is neither wise, nor necessary." (Vol. 2, 1976, Section 18, at 45-57; citations omitted.)

Other scholars have reached the same conclusions. Former Commissioner Robert Pitofsky noted the judicial deference given to the Commission's decisions, concluding:

"[T]his modest sounding rule is a principal reason that the Commission has managed to prevail in the appellate courts in the overwhelming majority of its [deception] decisions that have been appealed." (Beyond Nader: Consumer Protection and the Regulation of Advertising, 90 Harvard Law Review 661, at 667-68 (1977).)

He further states: "Why questions of meaning should be submitted to the virtually unreviewable discretion of five Commissioners of the FTC has never been articulated. Unlike other instances of deference to regulators as part of the administrative process, there is no reason to believe that Commissioners of the FTC have unusual capacity or experience in coping with questions of meaning, nor any indication that successful regulation of advertising requires a balance of related regulatory considerations that Commissioners are in a special position to handle." (Ibid., at 678.)

Well-known trade lawyer Ira Millstein's review of the Commission's use of its authority over false advertising reached similar conclusions. He notes: "[T]he courts appear at times to have narrowed the usual standards of judicial review and declared the meaning [of an ad] a question of fact 'to be determined by the Commission' or peculiarly within 'the Commission's special expertise and responsibility in the premises.' This judicial approach to meaning together with the courts' acquiescence in the Commission's use of a low intelligence level has left a wide discretion in the hands of the Commission to ascertain the meaning of the advertiser's promise." (The Federal Trade Commission and False Advertising, 64 Columbia Law Review 439 at 465 (1964); citations omitted.)

Millstein also notes: "[T]he Commission's determination of meaning—without evidence or despite contrary evidence—will nevertheless carry great, indeed undue weight upon review. (*Ibid.*, at 475.)

He concluded: "[T]he Commission's task under the statute . . . does not make the Commissioners any more capable of ascertaining the meaning of an advertisement's promise, whatever the intelligence standard selected, than any other five men (or possibly three), or reviewing court. Rather, courts should occupy in the advertising field the same appellate role they play in reviewing other administrative determinations—no greater perhaps, but certainly not less." (*Ibid.*, at 492-93; citations omitted.)

Nor has the Commission itself developed clear limiting principles for deception. As Professor George Alexander has observed: "Actually, the Commission rarely addressed itself to the question of what its own limiting criteria are; at best, these criteria seem to be embryonic." (*Honesty and Competition*, Syracuse University Press, (1967), at 16.)

Similarly, Dean Ernest Gellhorn has stated that: "[T]he FTC is given almost unlimited discretion to determine what are unfair or deceptive acts or practices." (Proof of Consumer Deception before the FTC, 17 Kansas Law Review 559 (1969), at 562.)

He also noted that most often the Commission relies on its own intuition concerning what an ad means. "The intuitive or hunch method is an unsatisfactory explanation to the respondent (and the public) of why an advertisement is unlawfully deceptive. It encourages frequent and endless appeals. Although the FTC's judgment is invariably upheld under this approach, the cost of party dissatisfaction, administrative delay, and fruitless appellate contests makes it undesirable, except where the deception is obvious or clear and any other method seems redundant and wasteful." (Ibid., at 565.)

In short, Mr. Chairman, there is a problem. Respected commentators from all portions of the political spectrum have noted with concern the enoromous discretion entrusted to the Commission. Congress has not provided clear guidance as to which cases the Commission should bring, and which are better left alone. The courts have deferred to the Commission's presumed "expertise," and have failed to develop clear standards for review. The Commission itself has not clearly articulated, or consistently followed, any set of limiting principles.

I believe that a statutory definition of deception will focus the Commission's resources on those cases that really matter, will help the courts review Commission decisions, and will lessen the existing ambiguity and provide greater certainty to consumers and businesses alike about what types of acts and practices the Commission will find lawful and those it is likely to challenge.

My proposed definition embodies concepts well known at common law and with which the legal profession (I'm told) is very familiar. Deception or misrepresentation can establish a cause of action in both the common law of torts and contracts. The elements necessary to void a contract for misrepresentation or to establish a tort cause of action in deceit are quite similar to the three basic elements of my proposed definition of deceptive acts or practices: first, the interpretation must be reasonable; second, the representation must be material; and third, any deliberate misrepresentation is actionable without the need to establish materiality.

Perhaps the most authoritative statement of these common law principles is found in the American Law Institute's recent "Restatement 2d of Contracts" and in its earlier "Restatement 2d of Torts."

As you may know, the American Law Institute was founded in 1923 by a group of prominent American judges, lawyers, and law professors in order to, among other things, simplify the existing common law by a clear, systematic restatement of it. The First and Second Series Restatements of the major areas of law have been written by eminent legal scholars and approved by the members of the Institute. Although the Restatements lack legislative sanction, in many instances they receive an authority nearly equal to that accorded to court decisions. Moreover, the Restatements are quite current. The second Restatements of contracts was adopted in 1979, for example.

The Institute's Restatements identify the common law principles that render a contract voidable for misrepresentation [1] and the criteria that establish a tort action for deceit.[2] Both Restatements incorporate the concepts of reasonableness and materiality. As to reasonable interpretations, the Restatement of Contracts requires an assertion that is not in accord with the facts. The statement is to be interpreted by considering the "meaning of the words in all the circumstances, including what may fairly be inferred from them." (Section 159(a).) Moreover, justifiable reliance on the misrepresentation is required. Finally, there must have been a fraudulent or material misrepresentation.

The Restatement of contracts defines a misrepresentation as material "if it would be likely to induce a reasonable person to manifest his assent, or if the maker knows that it would be likely to induce the recipient to do so." (Section 162(2).) The Restatement of torts also requires justifiable reliance upon the maker's misrepresentation in order to hold the maker liable for his or her deceit. However, according to the Restatement, reliance upon a misrepresentation is not justifiable unless the matter misrepresented is material (Section 538(1)). Materially is defined as a matter about which the existence or non-existence would be important to a reasonable person in determining a course of action in a transaction.

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[1] There are four criteria for voiding a contract for misrepresentation. First, there must have been a misrepresentation. Second, the misrepresentation must have been either fraudulent or material. Third, the misrepresentation must have induced the recipient to make the contract. Fourth, the recipient's reliance on the misrepresentation must have been justified. Restatement of Contracts 2d. 1979 (p. 425).

[2] The Restatement 2d of Torts states the rules for establishing an action for deceit as follows: One who fraudulently makes a misrepresentation of fact, opinion, intention, or law for the purpose of inducing another to act or to refrain from action in reliance upon it, is subject to liability to the other in deceit for pecuniary loss caused to him by his justifiable reliance upon the misrepresentation. (section 525.)

My proposed definition of deception incorporates the substance of these as a general rule, I believe common law concepts. Simply put, the Commission should direct its efforts against acts or practices that mislead consumers as a whole, not those that may mislead only a few acting unreasonably. The notions of justifiable reliance and fair inferences correspond quite closely to this concept. Moreover, there should be evidence that consumer injury is likely from misrepresentations before the Commission expends it resources; in other words, the claim should be material.

Like the Restatement, however, my proposed definition alters the general rule when the maker of the statement intends to deceive. Under my definition, when the maker knew or should have known that the statement was deceptive, there is no need for further evidence that injury is likely. Similarly, according to the Restatement of contracts, a showing of injury is not necessary if the misrepresentation is fraudulent. Moreover, the reason is essentially the same. An innocent misrepresentation about an unimportant aspect of a transaction is unlikely to have any effect. A deliberate claim, however, is intended to lead the buyer to act differently. In these circumstances, the Restatement of contracts notes:

> [T]he maker cannot insist on his bargain if it is attained, however unexpectedly, as long as the additional requirements of inducement and justifiable reliance are met. (Section 164(b).)

In the torts area, if the representation is intended to deceive, the courts have deviated from the reasonable person standard and found the representations material if the maker knows that the recipient is peculiarly disposed to regard it as important even though a reasonable person would not. (Restatement of Torts 2d, (Section 538.) They knew or should have known portion of my proposed definition similarly provides protection from deliberate misrepresentations.)

In summary, the law on deception at present is not clear. The Commission itself could address this problem by adopting internal guidelines. But while this would be an improvement, I believe it to be a second-best solution. In our system of government, it is Congress that should provide guidance for administrative agencies. Statutory definition of deception is the most appropriate way to provide that needed guidance and clarity.

[The following information was subsequently received for the record:]

QUESTIONS OF THE MAJORITY AND THE ANSWERS THERETO

Question. If advertising is exempt from unfairness jurisdiction, would you then suggest changing your proposed statutory definition of deception?

Answer. No. Deception and unfairness are separate and distinct public policy concepts, and Congress should clarify the appropriate legal standards for each. The concepts are complementary ones, and it is important for the Commission to have authority under both.

Deception should address practices that involve a representation, whether that representation is express or implied, that misleads reasonable consumers to their detriment, or a representation that the advertiser knew or should have known would be misleading.

Unfairness is a broader concept that should be used to reach acts or practices that do not necessarily involve misleading representations, but nevertheless substantially injure consumers. For example, the market may fail to provide information that would enable consumers to avoid some injury. When the benefits of providing such information exceed the costs, the Commission should be empowered to act to assure its availability.

Explicit statutory definitions of both deception and unfairness would provide much-needed guidance for the members of the Commission, who are appointed, not elected to their positions of authority. It would raise the level of accountability to Congress and the courts, and would provide a degree of certainty to those the Commission regulates. Although I oppose any Congressional action to strip the Commission of its important unfairness jurisdiction, I cannot support efforts to broaden the concept of deception to circumvent the will of Congress if the Commission's jurisdiction over unfair advertising is eliminated.

Question. Are there any additional details you can provide the Committee at this time on the proposed General Motors-Toyota joint venture?

Answer. Representatives of General Motors Corp. reportedly have acknowledged that on Monday, April 4, 1983, both GM and Toyota Motor Car Ltd. filed documents with the Federal Trade Commission concerning their proposed joint venture for the production of small cars in the United States. Whether such documents were filed with the Commission and the nature of their content is, of course, subject to restrictions against public disclosure provided in applicable statutes. Since the information that you request is "for the record," it would not be appropriate for me to discuss any of the details that we may have learned as a result of any submissions or through any investigatory activities in this matter.

Question. Has the Commission ever sought to remove the Liaison Committee on Medical Education from the position of accrediting medical schools? Please describe whatever action was taken by the FTC in this instance.

Answer. The Commission has never taken any such action. During the mid-1970's the Commission's Bureau of Competition examined widespread allegations that the American Medical Association, through its membership on the Liaison Committee on Medical Education (LCME), might be able to artificially limit the supply of physicians by restricting the number of medical students trained in the United States.

The Bureau never accused AMA of abusing its influence over accreditation. However, in voluntary cooperation with officials of the Office of Education of the Department of Health, Education and Welfare (later HHS), the Bureau filed comments in 1977 questioning whether AMA's authority within LCME was consistent with existing HEW regulations requiring that accrediting bodies be "autonomous" and avoid "conflict of interest." LCME was asked by the HEW Office of Education to make some changes in its operation. In 1980, the Bureau filed follow-up comments commending the steps that had been taken, and suggesting that the public interest might be better served by greater public representation on LCME.

Question. Has the Commission ever instituted action against the Association of Plastic Surgeons for requiring that its members be board certified? Please describe whatever action was taken by the FTC in this instance.

Answer. No, the Commission has never brought any action against a plastic surgery organization. The Commission's Bureau of Competition did conduct an investigation, beginning in 1976, of allegations that organizations of board-certified plastic surgeons had conspired to prevent other physicians, such as ear, nose and throat specialists (ENTS), who were traditionally trained in certain plastic surgery procedures relating to their specialty, from performing these procedures.

Allegations brought to our staff's attention included charges that plastic surgeons had unlawfully pressured hospitals to deny these physicians hospital privileges to perform the procedures they had been trained and certified to perform and that these actions were taken not to promote the quality of care but to insulate the plastic surgeons from competition. After a thorough investigation, and Commission review of the matter, no charges were brought and the investigation was closed. While the investigation was a "non-public" one, several erroneous charges about the Commission's investigation have appeared in the press. For example, it was alleged that the Commission had issued a complaint challenging the boards' certification system in an attempt to lower medical care costs by lowering the quality of medical care. In fact, no charges were ever filed and the Commission was investigating allegations that boycott-type activity based on private self-interest, not quality of care, had occurred.

Question. Please describe what actions the FTC is taking to explain its enforcement policies to professionals and professional societies.

Answer. The Commission is taking a variety of steps to increase its communications with professional groups. As Chairman, I have invited inquiries and contacts from professional associations, and have held several meetings with representatives of national professional societies, in order to explain the Commission's activities and to listen to their concerns. Speeches and articles by members of the Commission and ts staff also serve to explain the nature of the FTC's actions involving the professions.

The Commission is also trying to increase awareness within the professions of its advisory opinion procedure, which enables interested parties to request the Commission's views on the legality of a proposed course of conduct. Advisory opinions are an important means for clarifying the the reach of laws enforced by the FTC. For example, the Commission's approval of peer review of fees by professional associations was stated last year in an official advisory opinion to the Iowa Dental Association. In addition, staff attorneys regularly provide informal guidance to professional groups.

Question. Please describe any ideas you may have for statutorily expanding the authority of the Commission or improving Commission procedures or remedies so that the Commission may be more effective in protecting consumers.

Answer. In my judgment the Congress can assist the Commission by making a number of adjustments to the FTC Act. First, I urge you to consider amending Section 5 to define the Commission's authority to ban deceptive acts or practices. Second, I propose that Congress enact a definition of unfairness, as well. I believe these changes will increase the likelihood that FTC enforcement activities will genuinely benefit consumers.

In addition, I recommend several other statutory improvements. Section 5(g) should be amended so as to remove the incentive to file petitions for review simply for dilatory purposes. Such an amendment would bring the FTC on a par with other Federal agencies when issuing orders to cease and desist, and provide a date certain for the effectiveness of such orders absent affirmative action by the Commission or a reviewing court to stay the effective date.

Section 20 should be amended to provide for the issuance of civil investigative demands in investigations involving competition. Such an amendment would bring the Commission's investigative authority to perform its competition mission on a par with its investigative authority to perform its consumer protection mission.

Section 18, which pertains to rulemakings, should be amended. I believe that before the Commission initiates a rulemaking proceeding it should have firm evidence that a problem is prevalent in the industry, and not just sporadic. Therefore, I believe that Section 18 should be amended to specify the elements required to establish that a problem is prevalent in the industry.

Finally, I believe that Section 5(m) should be amended. This section permits the Commission to serve existing cease and desist orders on persons who were not parties to the previous Commission proceeding and seek civil penalties from such persons if they violate the provisions of the order. While I believe that this section of the Act should be retained, fairness dictates that the section be amended to permit defendants who were not parties to the original proceeding to seek review of the Commission's legal basis for the order.

QUESTIONS OF THE MINORITY AND THE ANSWERS THERETO

Question. With the courts taking a hard look at agency action—independent agency action is subject to closer scrutiny than in the past. The Commission may have relied solely on its own expertise in the past but tougher standards of judicial review will require the Commission to have more evidence to back up any action taken. Does this tougher scrutiny answer many of your criticisms concerning past judicial deference to Commission expertise?

Answer. Although recent Commission and court decisions indicate that the agency is now using a reasonableness standard in determining the meaning of an ad[1] judicial review alone cannot cure the defects inherent in the current unbounded structure of the statutory deception provision. I believe that Congress, not a Commission of unelected officials or the courts, is the proper body to determine the appropriate legislative standards. Clear language incorporated into the Federal Trade Commission Act will be a statement of the agency's mission. It will tell the Commisson what the American people want us to do and, equally important, what the American people do not want us to do. Without specific language, the Commission is largely not accountable to the public because the Commissioners decide for themselves how they want to use their broad discretrion. And when the composition of the Commission changes, so too do the standards.

Moreover, a statutory definition will facilitate judicial review by spelling out the standards upon which the courts should base their review of Commission action. This improvement will promote consistency in the decisions of the appellate courts and, in turn, increase the Commission's own confidence in its decisions.

Question. Is materiality in past FTC decisions the same as your concept of injury with your deception standard? If not, are you adding a new burden of proof? If yes, then why are you suggesting a change?

Answer. The concept of injury in my deception standard is essentially identical to a properly applied materiality test. Under common law, a finding of injury is implied in the requirement of materiality. This principle of common law has two elements. First, the consumer must rely on the claim; second, such reliance must be to the consumer's detriment.

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[1] See *Standard Oil of California* v. *FTC*, 577 F. 2d 653 (9th Cir. 1978); *Simeon Management*, 87 F.T.C. 1184, 579 F. 2d 1137 (9th Cir. 1978); *Sears, Roebuck & Co.*, 95 F.T.C. 406 (1980).

Unfortunately, the case law under the FTC Act reveals that a materiality test has not been consistently applied in FTC decisions. While the Commission and courts have on occasion stated that materiality is an element in cases of deception under Section 5, in other instances they have indicated that materiality is not an element. In some cases where the facts would seem to raise a serious question of materiality, there is little or no discussion of the issue.[1] In other cases, the issue of materiality absorbs the Commission's attention.[2]

The proposed statutory deception standard would establish materiality as a certain, consistent and clearly applied standard in deceptive advertising cases. Inferences about materiality and the likelihood of injury frequently will be the only evidence necessary, because the key question is whether consumers would have given up something of value by their reliance on the misleading claim. For instance, when an advertiser claims that a product has a certain feature that consumers would like, we can normally assume that the claim is material since the product is worth more to consumers if the claim is true.

Consequently, showing materiality and the likelihood of injury frequently can be accomplished through inferences that will not substantially complicate those cases when the Commission should act. But, where it is unclear whether consumers have given up something of value in reliance on a misleading claim, extrinsic evidence of consumer injury should be necessary.

That the Commission's statutory mandate contain a materiality element simply makes good sense. The Commission's responsibilities in policing the American marketplace are too vast and its resources too modest for it to pursue misrepresentations when injury is unlikely.

Question. We heard testimony at the July hearing on deception that the FTC's "deception" powers are both well established in the case law and well understood by the advertising community. Is there really any need for Congress to tamper with the statutory definition of "deception" and, if we do so, will we create more uncertainty by doing so?

Answer. As it exists now, the case law on deception is anything but well-defined and certain. The present law gives virtually unlimited discretion to the Commission to declare an act or practice deceptive. This unguided discretion creates great ambiguity about how the law will be applied. Further, this discretion and ambiguity have resulted in decisions by the Commission that may have harmed consumers rather than helped them.

I am by no means the first to observe the lack of clarity in FTC law concerning deception. Many commentators and scholars have remarked on the unbridled discretion the Commission possesses, the lack of guidance provided by Congress and the courts, and the concomitant lack of certainty and predictability that results. For example, in their two-volume treatise, "The Law of Advertising," George and Peter Rosden note:

"There is no doubt that neither the Federal Trade Commission nor the Legislature nor the courts of review have set a standard . . . that permits the advertising community or even their lawyers to predict with a reasonable percentage of probability whether or not a proposed advertisement complies with the law." (Vol. 2, 1976, Section 18, at 35.)

Respected commentators from all portions of the political spectrum have reached the same conclusion.[1]

In short, there is a problem I believe that a statutory definition of deception will focus the Commission's resources on those cases that really matter, will help the courts review Commission decisions, and will lessen existing ambiguity and provide greater certainty to consumers and businesses alike about what types of acts and practices the Commission will challenge as unlawful.

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[1] See, e.g., *Mary Carter Paint Co.*, 60 F.T.C. 1827 (1962), 333 F.2d 654 (5th Cir. 1964), reversed and remanded, 382 U.S. 46 (1965), modified, 70 F.T.C. 528 (1966).

[2] See, e.g., *Manco Watch Strap Co., Inc.*, 60 F.T.C. 495 (1962).

[1] See, e.g., Pitofsky, "Beyond Nader: Consumer Protection and the Regulation of Advertising," 90 Harvard Law Review 661 (1977); Gellhorn, "Proof of Consumer Deception before the FTC," 17 Kansas Law Review 559 (1969); Alexander, "Honesty and Competition" (Syracuse University Press 1967); Millstein, "The Federal Trade Commission and False Advertising," 64 Columbia Law Review 439 (1964).

Question. What is a reasonable consumer? Under your proposal, may the Commission interpret an ad on its own, absent direct evidence of how consumers interpret the ad?

Answer. At common law, a claim that a representation is deceptive hinges on "reasonable" interpretations of it. The significance of the seller's words are determined according to the effect they produce, under the circumstances, upon the ordinary mind of the targeted audience. In my opinion, the common law notion of "reasonableness" provides a framework for sensible Commission enforcement against deceptive marketing, selling, and advertising practices.

Two problems exist with challenging truthful representations that reasonable or ordinary consumers understand correctly. First, such cases misuse the FTC's resources. When few consumers misunderstand the representations, few can be injured. Second, cases against claims misunderstod at most by only a small minority injure the majority of consumers. By prohibiting such representations, the Commission makes it more difficult for consumers to receive truthful and useful information about goods and services they might purchase.

Extrinsic evidence regarding the interpretation consumers place on an ad will be required only in close cases when the meaning consumers take is unclear or when the Commission's interpretation of the ad is counter intuitive. In many instances, the meaning of a representation to the typical consumer is likely to be apparent, and the ad itself may be the only evidence necessary. Where an ad is capable of multiple, plausible interpretations, not all of which may be deceptive, extrinsic evidence would be necessary in order for the Commission to find how the ordinary consumer would interpret the challenged representation. For instance, in *Kroger*, without any evidence about the ads' meanings, the Commission held that the ads implicitly represented that the advertised comparative food price surveys were "methodologically sound" and "statistically projectable", despite the aura of informality that the ads conveyed. *Kroger Co.*, 98 F.T.C. 639 (1981), modified (Dec. 29, 1982), appeal dismissed, No. 81-7937 (11th Cir. Feb. 1, 1983). In this case, under the proposed standard, extrinsic evidence about the ad's meaning would have been required.

Question. What steps are you taking to ensure that the 10 regional offices are adequately funded and staffed?

Answer. It is our intention to maintain regional offices at their approved staffing levels (18 staff members in all offices except Boston, 17, and Denver, 9) and to ensure that they are adequately funded. Should any office drop below the indicated employment levels, steps will be taken to bring them back to the approved strength. These staffing plans are in accord with the Congressional guidance provided the Commission. It is fully anticipated that these levels will be maintained in fiscal year 1984 and that these levels will provide an adequate regional office structure for the Commission.

Question. Please give the Committee your views on the proposed Funeral Rule.

Answer. I cannot in good conscience go along with a final rule affecting the funeral industry at this time. I do not oppose a rule in principle. Indeed, I've always said that this is an area worthy of Commission investigation. But for the reasons set forth below, I believe that action at this time is ill-advised.

Furthermore, I want to make it clear that I respect the views held by my colleagues on the Commission. This is neither a Republican not a Democratic issue. It is neither conservative nor liberal. The question is whether the action taken today can be defended. I believe it cannot.

The basic reason for my opposition to today's action is the lack of evidence in the record. That record is woefully inadequate for a proceeding that has lasted 10 years. In my view, the Commission does not have a reliable description of the industry, much less a working knowledge of how it operates. The facts presented are often contradictory, are heavily anecdotal, and may not be representative of industry practices. From what description can be gleaned from the record, two theories seem to fit equally well: (a) that the industry is operating quite effectively, and (b) that the industry is vitiated with market imperfections crying out for governmental intervention.

Nor do we have any basis in the record to conclude that the rule approved today will adequately deal with alleged market imperfections, assuming they exist. For example, the requirement that services be "unbundled" can easily be circumvented by funeral directors' simply charging higher prices for services a' la carte. (The point about the price of a new automobile's being far less than the summed prices of all new parts is particularly relevant here.)

Moreover, certain provisions may actually harm consumers. For example, the only empirical evidence we have of the effects of forced unbundling (in Minnesota) suggests increased costs to consumers. Also, the requirement of prior authorization before embalming may well raise costs to consumers, diminish their satisfaction with the overall service, or have both effects.

Because of the paucity of evidence in the record, I believe it is likely the courts would sustain a legal challenge to the rule. This risk could have been mitigated if the Commission had taken my recommendation and had reopened the rulemaking record for the submission of additional evidence. The Commission's own "baseline" study, in particular, should have been entered into the record, even if this would have meant a few months delay while the Commission accepted public comment on it.

Portions of the baseline study seriously challenge the theory of market imperfections that is implicit in the Commission's action. For those who think the baseline study actually supports the Commission's rule, it is ironic that by refusing to admit it into evidence the Commission forgoes the opportunity to use the study's results to support the rule, but enables anyone to use it in challenging the Commission's action.

Beyond the integrity and sufficiency of the formal record—on which of course the Commission's decision must be based—there is one other matter I wish to touch upon briefly. I believe that the Commission's action today will make it considerably more difficult to resist efforts by the "learned professions" to obtain exemption from FTC laws concerning unfairness and deception, and from FTC enforcement of the antitrust laws. Indeed, there is a plausible argument that the objects of the Commission's action—funeral directors—would be exempt under the language already adopted by the Senate Commerce Committee ("Federal Trade Commission Amendments Act of 1982").

In conclusion, I fear that today the Commission has deceived a very vulnerable segment of American consumers. The Commission's action is deceptive because it raises expectations of lower prices for funerals and better service, when in fact we have little evidence to believe the rule would have these effects. It is also deceptive because the rule may well be reversed in the courts. As if this were not enough, the Commission's action places in further jeopardy a much more important matter—the Commission's efforts to police anticompetitive, unfair, and deceptive practices in the professions.

In view of the inadequacy of the record, I respectfully dissent from the Commission's action. In the larger view of all that is at stake, I fear that in this case the Commission is showing signs of returning to its errant past of regulating first and asking the right questions later.

Question. Do you agree that the Supreme Court in *Dr. Miles* and subsequent cases established as the law of the land that resale price maintenance is per se illegal?

Do you agree that your enforcement of resale price maintenance has diminished substantially?

In your opinion, is there any justification whatsoever for a manufacturer setting and enforcing a minimum sales price for its goods?

Answer. (Respectfully, for the sake of coherence and of avoiding repetition, I will respond to the three closely related questions on this topic in continuous form.) The present status of the Supreme Court's 1911 *Dr. Miles* declaration on resale price maintenance (RPM) is far from clear. Although recent Supreme Court decisions have contained statements that certain vertical restraints are subject to per se antitrust analysis, legal commentators and at least one member of the Court have observed that this position is logically inconsistent with the Court's own reasoning in *Continental T.V. Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36 (1977). Before this case, the Court broadly condemned all vertical restraints as per se illegal; *Sylvania* recognized that this position was bad economics and bad law. Unfortunately the case law after *Sylvania* that attempts to distinguish between vertical restraints subject to per se treatment and those subject to rule of reason analysis is very confused. The Court has recently given itself another opportunity to clarify the law of vertical restraints by granting certiorari in *Monsanto Corp.* v. *Sprayrite.*

In determining which vertical cases to bring, the Commission under the FTC Act needs to determine whether pro- or anti-consumer effects predominate. Since its enactment in 1914, the Act has placed on the Commissioners a duty to issue administrative complaints only when such action "would be to the interest of the public." 15 U.S.C. § 45(b). This obligation places a special responsibility upon the Federal Trade Commission, an agency Congress intended to be expert in the field of trade regulation. Thus, although the FTC Act gives the Commission the authority to challenge and prevent violations of the antitrust laws, it requires a further "public interest" finding.

As I have stated publicly many times, during my tenure as Chairman the Commission will continue to enforce the antitrust laws governing vertical restraints. Enforcement in the vertical restraints area as measured, for example, by the number of consent orders entered has been at a lower level during my Chairmanship. This result is reasonable given the process of evaluation already described and the necessity of responding to the guidance of new economic and judical thinking regarding the appropriateness of vertical restraints. If we were willing to bring cases without determining whether they would both help consumers and be sustained in court, then we could of course bring more cases. This policy would, however, be most unwise because it would waste resources and harm consumers.

What I have already said reveals that I believe that there can be pro-competitive reasons for a manufacturer to set and enforce minimum resale prices for its goods. These reasons are in large part the same ones the Supreme Court described in its *Sylvania* decision, 433 U.S. at 54-55:

"Vertical restrictions promote interbrand competition by allowing the manufacturer to achieve certain efficiencies in the distribution of his products. These 'redeeming virtues' are implicit in every decision sustaining vertical restrictions under the rule of reason. Economists have identified a number of ways in which manufacturers can use such restrictions to compete more effectively against other manufacturers. * * * For example, new manufacturers and manufacturers entering new markets can use the restrictions in order to induce competent and aggressive retailers to make the kind of investment of capital and labor that is often required in the distribution of products unknown to the consumer. Established manufacturers can use them to induce retailers to engage in promotional activities or to provide service and repair facilities necessary to the efficient marketing of their products. Service and repair are vital for many products, such as automobiles and major household appliances. The availability and quality of such services affect a manufactuer's goodwill and the competitiveness of his product. Because of market imperfections such as the so-called 'free rider' effect, these services might not be provided by retailers in a purely competitive situation, despite the fact that each retailer's benefit would be greater if all provided the services than if none did. * * *" (Citations omitted.)

The conclusion that the Court reached in *Sylvania* applied only to non-price vertical restraints. It is nonetheless apparent from an economic standpoint that the argument applies equally well to price restraints. Justice White's concurrence acknowledged as much. 433 U.S. at 70. In the end, the position that RPM is in some cases pro-competitive can perhaps be best appreciated simply by asking why some manufacturers who lack market power, and thus are in intense competition with other manufacturers, would ever choose to employ it unless it was pro-competitive. If using RPM to support retailers' provision of services to consumers did not result in more consumers choosing his product, because they value the combination of goods and services, such a manufacturer would be operating against his commercial self-interest. When manufacturers collude, however, and use vertical restraints to reinforce that collusion, Commission action is clearly appropriate. We will vigorously pursue such cases and other anticompetitive uses of vertical restraints.

I thus am not advocating that RPM be made per se lawful. That is not my position and never has been. Indeed, in 1975 I supported the Ford Administration's successful efforts to repeal the Miller-Tydings Act of 1937, which (among other things) effectively made RPM lawful per se where state law so provided.

Question. Should injury to business competitors or injury to the marketplace by a deceptive ad be examined by the FTC?

Answer. Our primary focus always should be on injury to competition and consumers, not injury to specific competitors. Any advertising that works injures competitors, because it leads consumers to purchase the advertised product rather than other brands. A definition of deceptive advertising should reach only ads that wrongly divert trade. In other words, the injury to competitors that is relevant for public policy purposes is injury from losing consumers who are injured by another firm's deception. When there is no likelihood of consumer injury in the process, disputes among competitors are best resolved by the market, not the Commission.

Question. What effect will defining "deception" have on the ad substantiation program if the current restrictions on "unfairness" jurisdiction over commercial advertising are continued?

Answer. Ad substantiation is an important enforcement tool that can increase the welfare of consumers. Although the program was initially grounded on the Commission's unfairness jurisdiction,[1] subsequent Commission cases have emphasized the deception rationale for requiring substantiation.[2]

The principles of my proposed statutory definition of deception are fully consistent with a sound ad substantiation program. It is reasonable to interpret most factual advertisements as containing an express or implied claim that support exists for the advertised product characteristic. In most cases the Commission will be able to reach this conclusion without the need for extrinsic evidence of the ad's meaning. Moreover, such claims are also material because available evidence indicates consumers tend to rely more heavily on claims that they believe are supported by tests or surveys.

Unfortunately, however, the Commission sometimes has failed to base substantiation requirements on what the ad actually expressed or implied to consumers. Therefore, it has sometimes required a higher degree of substantiation than consumers expected, suppressing truthful claims and depriving consumers of valuable information.

A more detailed discussion of these important principles is included in the memorandum on ad substantiation from the Director of the Bureau of Consumer Protection, dated November 8, 1982. A copy is attached.[1]

Question. In your opinion, would setting standards concerning deceptive practices minimize uncertainty?

Answer. See answer (3) to minority questions.

Question. How would defining "deception" affect the FTC's authority over statements which are deceptive by omission?

Answer. The statutory proposal defining deception would permit the Commission to require affirmative disclosures when necessary to prevent a representation from misleading consumers. The proposed reasonable interpretation standard is concerned with the effect of an advertising claim on the beliefs of consumers, acting reasonably under the circumstances.

An advertisement may be literally true but still lead many consumers to draw false inferences about a product; this has the same effect as if the false inferences had been stated explicitly. In such a case, deception may occur through the advertiser's failure to disclose the information necessary to prevent consumers from forming the false beliefs.

For example, a seller may claim that a product "kills bacteria that cause baldness". This statement may be literally true, but nevertheless deceptive to the vast majority of men whose baldness is due to hereditary factors. Thus, whether an advertisement misleads consumers to their detriment depends not on the formal rules of semantics and logic, but on what message the advertisement conveys to the typical member of the target audience. Because the reasonable consumer is likely to respond to the "kills bacteria that cause baldness" claims by forming the natural but inaccurate belief that the baldness cure will be effective treatment for his baldness, it would be deceptive for the advertiser to fail to disclose that most baldness is due to hereditary factors. See *Ward Lab., Inc.,* 55 F.T.C. 1337 (1959), 276 F.2d 952 (2d Cir.), cert. denied, 364 U.S. 827 (1960).

Whether the statutory proposal would permit the Commission to proceed on deception grounds against sellers of a product for failing to disclose certain information depends on whether affirmative disclosure is necessary to correct any false belief otherwise formed or reinforced in reasonable consumers by the advertisements under consideration.

Even when a failure to disclose certain information is not deceptive, disclosure might be required in certain circumstances under an unfairness theory. Disclosure would be appropriate if the failure to disclose caused substantial injury that consumers cannot reasonable avoid, without offsetting benefits to consumers or competition.

Question. What effect would Chairman Miller's proposal have on deceptive practices (other than advertising) challenged by the Commission?

Answer. Most of the discussion and debate concerning the merits of a statutory definition of deception has necessarily focused on cases involving advertising, rather than other business practices, because so many of the adjudicated principles of deception have arisen in the context of advertising. Despite the focus of the discussion, the flexibility of the proposed definition will allow the standard to be applied easily to nonadvertising cases.

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[1] *Pfizer, Inc.,* 81 F.T.C. 23 (1972).

[2] See, e.g., *National Dynamics,* 82 F.T.C. 488 (1973), modified, 492 F.2d 1333 (2d Cir.), cert. denied, 419 U.S. 993 (1974); *Crown Central Petroleum Corp.,* 84 F.T.C. 1493 (1974), modified, 530 F.2d 1093 (D.C. Cir.), reissued, 88 F.T.C. 210 (1976).

[1] The memorandum was retained in the committee files.

In marketing practices cases, there is also a representation to which the reasonableness and injury standards can be applied. Analysis will, therefore, be similar to what has been discussed in the advertising cases. Indeed, two of the cases discussed in my testimony before the Senate Consumer Subcommittee on July 22, 1982, *Trans World Accounts* [1] and *Travel King,*[2] involve marketing practices other than advertising.

Question. Would you oppose an extension (for the life of the authorization) of the 1980 Act's agricultural cooperative provision?

Answer. Section 20(a) of the FTC Improvements Act of 1980 prohibits the FTC from "conducting any study, investigation, or prosecution" of any agricultural cooperative for conduct that the Capper-Volstead Act exempts from the antitrust laws. This provision has not markedly impeded the FTC's traditional statutory law enforcement activities involving agricultural cooperatives, that is, investigations and cases based on nonexempt conduct. Thus, an extension of Section 20(a) would probably not significantly alter such traditional law enforcement by the FTC.

However, Congress has historically intended that—in addition to a traditional law enforcement function—the FTC have and use the authority to analyze and report on competition and economic subjects of interest to Congress and the public. This traditional analytic and reporting function has been eliminated by Section 20(a), under which the FTC may not—even upon the request of a Congressional Committee—prepare any economic analysis (for example, an analysis of costs and benefits or of likely effects upon competition) of agricultural cooperatives' conduct that is exempt under the Capper-Volstead Act. Moreover, Section 20(b) of the FTC Improvements Act of 1980 similarly prevents the FTC from analyzing and reporting on agricultural marketing orders, even though the FTC's economic and competitive analyses could be useful to the Congress and to the Secretary of Agriculture in their public policy determinations.

The FTC's traditional function of preparing economic analyses and reports contributes to informed Congressional and Executive Branch decision-making and to informed public debate. Because an extension of Section 20 would prevent the Commission from fulfilling this traditional and important function, Congress should reject such an extension. However, should Congress decide to extend Section 20, it would be desirable to include an amendment to permit the FTC, upon request of any Congressional Committee or the Secretary of Agriculture, to prepare reports on agricultural marketing orders or on conduct which is exempt under the Capper-Volstead Act.

Question. Would you object to a permanent provision for a legislative veto?

Answer. No.

Question. Do you believe the FTC has systematically misapplied the deception doctrine?

Answer. No. Throughout its controversial history, the Commission has reached many reasonalbe decisions that have protected consumers from deceptive acts and practices. The absense of a clear definition of deception, however, has also resulted in cases that illustrate the Commission's inappropriate use of its discretion. The proposed statutory definition of deception should increase the level of shared understanding of what distinguishes a good case from a bad case and help the FTC to fulfill its promise of providing consistent and substantial protection to consumers.

QUESTIONS OF SENATOR LAUTENBERG AND THE ANSWERS THERETO

Question. Based on your response at the March 16 hearing, would the committee be correct in assuming that, contrary to some reports, there are no plans by you or Mr. Muris to make any changes in the organization, duties or responsibilities of senior managerial personnel at the Bureau of Competition? If not, what are those plans? Will Mr. Campbell's departure result in any changes in the Bureau's policies? If so, what are those changes?

Answer. At the present time neither Mr. Muris not I plan to change either the management team and sturcture Mr. Campbell put in place or the policies that he ably pursued. We do not, of course, preclude the possibility that efficient management may at some point indicate that change is desirable.

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[1] 90 F.T.C. 359 (1977), modified, 94 F.T.C. 141, further modified, 94 F.T.C. 1051, aff'd in part and remanded in part, 594 F.2d 212 (9th Cir. 1979). Note that *Trans World* arose before the enactment of the Fair Debt Collection Practices Act. 15 U.S.A. §1692 and would now fall within the purview of the statute.

[2] 86 F.T.C. 715 (1975).

Question. Several members of Congress have expressed their concern about Chairman Miller's professed intention to exercise his "prosecutorial discretion" in enforcing the antirust law governing resale price maintenance. In particular, many members from New Jersey have inquired about the status of the Commission's response to complaints by the Burlington Coat Factory, a clothing retailer, that it has been the vicitm of illegal resale price maintenance. In light of this Congressional concern, would the members of the Commission, individually or jointly, set forth publicly, and in clear detail, the standards it intends to apply in determining whether, in a given case, it is in the public interest to enforce the law prohibiting resale price maintenance?

Answer. In cases involving resale price maintenance—as in all cases arising under Section 5 of the Federal Trade Commission Act—the Commission must determine whether the pursuit of a law enforcement action is consistent with the Commission's statutory mandate to act in the public interest. While private litigants are free to pursue cases constrained only by the outermost boundaries of the law, the Commission must consider its cases in terms of their potential impact on competition and consumers. In short, I believe that the Commission's cases should help, rather than hinder, competition and should benefit, not harm, consumers. That way, taxpayers also reap the greatest possible benefits from resources invested in antitrust enforcement.

Although vertical price restraints—including resale price maintenance—have often been described by the courts as per se violations of the antitrust laws, it is clear that in some circumstances a manufacturer's use of such restraints may actually stimulate rather than impede competition. Manufacturers may employ resale price maintenance in order to induce dealers to engage in demand-generating activities—such as the provision of promotional services and information—that aid the manufacturer in its competition with producers of similar products. A distributional strategy involving resale price maintenance may be particularly procompetitive (and, in my view, inappropriate for prosecution) when a new manufacturer is attempting to penetrate a market or an existing manufacturer is attempting to introduce a new product line.

Absent vertically-imposed restrictions on intrabrand competition, dealers may be unwilling to expend the funds necessary for the provisions of information or services for fear that they will be undercut by other dealers that incur no such promotional costs.

In *Continental T.V. Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36 (1977), the Supreme Court departed from precedent and announced a new approach to non-price vertical restraints, which would thenceforth be judged under the rule of reason rather than condemned as per se illegal (the previous standard). The Court recognized that even though intrabrand competition may be limited to some degree, vertical restraints may have many beneficial effects on interbrand competition. Because resale price maintenance may sometimes have the same procompetitive effects, many lawyers and economists now believe that vertically-imposed price restraints also should be judged by a rule-of-reason standard.

Resale or price maintenance, however, does not always have the beneficial effects on interbrand competition described above, and for that reason I do not endorse the views of those who argue that the practice should be per se legal. A cartel of colluding manufacturers may impose resale price maintenance in order to facilitate stabilization of prices at the manfacturer level. Similarly, a cartel of colluding dealers—or even a single dealer that is a monopsonist—may use its market power to coerce a manufacturer into adoption of resale price maintenance in order to stabilize prices at the retail level. In cases involving the imposition or inducement of resale price maintenance by firms with market power, consumers clearly can be harmed, and the commission should seek to restrain such behavior.

When resale price maintenance is used by a manufacturer to stimulate demand for its product—and interbrand competition is accordingly enhanced—I believe the consuming public would be ill-served by a Commission challenge. The Commission, however, should pursue vigorously cases in which resale price maintenance stems from collusion or abuse of market power by manufacturers or dealers. This type of case-by-case evaluation of possible competitive problems is what Congress had in mind when it established the Commission as an expert body in the field of trade regulation.

Question. Would the Commission also furnish statistics for each of the last five full years, plus the year to date, on the following:

The number of cases subject to a so-called "100-hour investigation" or preliminary investigations in which resale price maintenance was alledged;

The number of cases subject to a formal investigaiton in which resale price maintenance was alleged;

The number of complaint recommendations tendered by Bureau of Competition staff to the Commission in which resale price maintenance was alleged;

The number of complaints issued by the Commission in which resale price maintenance was alleged; and

The number of consent agreements entered involving resale price maintenance?

Answer. The requested information is set forth on the chart below.

Event	Fiscal year—					
	1978	1979	1980	1981	1982	1983 [1]
A. Preliminary investigations opened where RPM was one of the alleged violations	4	13	53	41	10	20
B. Full-phase investigations opened where RPM was one of the alleged violations	8	4	10	13	1	2
C. Part III complaint recommendations submitted to Commission where RPM was one of the alleged violations	(2)	(2)	(2)	1	0	0
D. Part III complaints issued by the Commission where RPM was alleged	0	0	[3] 1	0	0	0
E. Final consent orders entered involving RPM	3	5	8	1	1	1

[1] Data for fiscal year 1983 covers Oct. 1, 1982 to Apr. 20, 1983.

[2] Data for this period was not available on computer.

[3] This matter, Russell Stover Candies, Inc. (D9140), resulted in a Commission decision on July 7, 1982.

The CHAIRMAN. Thank you, Mr. Chairman.

Mr. Clanton.

Mr. CLANTON. Thank you, Mr. Chairman, members of the committee. I will be brief making five points.

The first goes to the basic question of our funding and the time frame that we have been under. As you know, we have been before you a number of times in the last 3 or 4 years. We have gone through several iterations of legislative proposals going back to the 1980 Improvements Act.

I must say that I think that oversight has been beneficial to the Commission. We have gained something useful by that process, but it seems to me we are reaching a point where the continued uncertainty is having counterproductive effects, and really a debilitating effect on the agency.

What I simply urge is that we try to resolve this whole process as quickly as we can. I think it is important, however, that we get adequate funding. We have been through a period of several years where we have been reducing funding consistently. To date, we have been cut back roughly 30 percent.

I have supported some of those cuts, because I think the agency should share its own fair burden of reduction in Federal spending, but I think we have reached a point where we are at the bottom of what is prudent further cuts, and I would hope that we can get adequate funding so that beginning in fiscal 1984 we do not have to make any additional cuts for some period of time—at least the period of the authorization.

The second point I want to mention concerns the definition of unfairness. I agree with the chairman and the majority of the Commission that it makes sense to codify the definition of unfairness that reflects what we have done in our policy statement back in 1980. The reason I support this effort is, in the unfairness area, we have not had a lot of case precedent, in fact, very little, clarifying what the standard is.

Therefore, it seems to make sense to write something into the statute that not only gives us better guidance, but the courts as well. Indeed, I think a definition in the statute may enhance our ability to bring cases which are soundly based.

I object, however to the proposal to exempt advertisers. It seems to me there really has not been any convincing case made that you need to treat advertising differently. Frankly, I do not think there are many cases where an unfairness theory would represent the sole rationale for going after an advertising campaign. If we have a definition of unfairness, it solves any problems with respect to the advertising areas.

Third, on the question of deception, I understand and I sympathize with what the chairman has said about the need for clarity and guidance. I believe very strongly in that principle in all of the Commission's activities.

I supported early on an effort to do that in the unfairness area. I also would support an effort to do that on the deception side. However, the state of affairs is somewhat different in the deception area. Although I agree that you can read some cases in the past as sending somewhat diverse signals, a fair reading of the precedent and the cases will indicate that there is a fairly clear standard in the deception area. Quite frankly, it is not that far apart from what the chairman is proposing.

My only concern is that attempting to modify that standard at this stage is that it will inevitably create some uncertainty and confusion as to whether there really is a major revision of the deception doctrine.

In any event, even with the standard that the chairman proposes, there is an inevitable amount of discretion that will be left with the Commission and the courts. His proposal, for example, would require that interpretations of advertisements be reasonable. I think that is the standard today, but the debate, of course, invloves around what is in fact reasonable. It may vary among different groups of consumers. It may vary among the Commissioners sitting here. In most cases, however, it simply requires people sitting down and taking a look at the advertisements and making commonsense judgments as to what they say.

I think as a practical matter there is no way to delineate in a statute the degree of precision that the chairman suggests. I do think, however, we could all benefit by going back and having the Commission pull together all the precedent that we have on the subject. There is a lot. We could make some progress in this area by giving some signal as to which of those cases we are not adhering to as fully as we did in the past—getting a little better sense of clarity as to what our interpretation is. That can be done readily. I think there are large areas of agreement as to the state of the law and I would support such an effort.

I will not say any more on the professions. We have had very strong unanimity on that point, and I think we have a track record that demonstrates the need for continued Commission action in that area.

Finally, on civil penalties, I do not object to a cap, but I do believe the suggestions that have been made, even a proposal last year of the committee for a $1 million cap, really are inadequate. That is not to say that we have had a lot of cases that have exceeded this amount. We have had only two. Most of the debate has focused on the Readers' Digest case, but a careful look at that decision will underscore the fact that we need flexibility.

I might agree that the harm to consumers was by no means as great in that case as it might be in other cases, but for that fact alone, I think you need to preserve a sufficient flexibility and ceiling to provide adequate deterrence. So, at a minimum, I would favor a considerably larger cap than that.

Thank you.

[The statements follow:]

Statement of David A. Clanton, Commissioner, Federal Trade Commission

Mr. Chairman and members of the committee: I appreciate the opportunity to appear before you today to testify on our authorization bill. As the Chairman's statement describes, the Commission is doing a better job of managing its resources. I believe we have responded effectively to congressional concerns and guidance expressed over the past few years. On the enforcement side, we have increased the level of activity significantly in recent months, especially on consumer matters, and I would expect that pace to continue, if not intensify.

My principal recommendation, Mr. Chairman, focuses on the critical need to get the seemingly endless debate about funding and statutory authority behind us, once and for all. It it time, past time, for the Commission to have the luxury of devoting its attention exclusively to substantive enforcement issues.

As you know, Mr. Chairman, I have supported reductions in agency funding and the number of regional offices, believing that we should shoulder our fair share of the burden of Federal spending cuts and that a smaller agency could still effectively carry out its statutory mandate. I have also supported some changes to our statutory charter, specifically a codification of the Commission's policy statement on consumer unfairness. These and many other issues, including the debate over the professions, have preoccupied the Commission, and Congress, for a considerable period of time. In fact, the FTC, with very few exceptions, has been caught up in the midst of legislative controversy and organizational change since early 1979. I do not quarrel with Congress' prerogative—indeed obligation—to exercise close oversight over agency actions; in many ways, that oversight has had a beneficial impact on the Commission.

Nevertheless, continued uncertainty and prolonged controversy can have a debilitating effect on an agency's performance. In view of this state of affairs, I sincerely hope that fiscal year 1983 marks the end of the struggle—at least for the life of the authorization, if not longer—on funding, agency reorganization and basic statutory change. In particular, I urge that the agency be given sufficient funding authority for fiscal year 1984 and subsequent years so that the Commission will not have to take further personnel actions or impose other severe spending restrictions, whether at headquarters or in the regions. Since Congress has directed the Commission to keep all 10 of its regional offices open, I believe it is essential that we have adequate funding authority to insure that there are no additional spending squeezes in fiscal year 1984.

With respect to basic statutory modifications, there also is an urgent need to resolve these issues finally this fiscal year. That is especially true in the profession area, one of the Commission's most effect programs, where the cloud of uncertainty has hovered over the agency for some time.

UNFAIRNESS

As I mentioned previously, I support an amendment to Section 5 of the FTC Act incorporating into the statute the essence of our 1980 Policy Statement on Unfairness. That Policy Statement is being adhered to by the Commission now, it is workable and it would add clarity to an area of the law that, until recently, has been very murky. Unlike the issue of deception, there is little established case precedent defining the contours of unfairness. Thus, there is a clear justification for providing statutory guidance on this subject.

I strongly disagree, however, with the proposal advanced by advertisers that they be exempt from the Commission's unfairness jurisdiction. They believe, no doubt sincerely, that there is the potential for some future Commission to unleash a broad-based attack on advertising that is not deceptive, either because the advertising promotes a "bad" image or is not informative enough. Quite frankly, it is extremely difficult for me to imagine any future Commission attempting to undertake such an imaginative task. For one thing, the Commission's 1980 Policy Statement makes it clear that there are few areas where unfairness would be the only appropriate theory for challenging an advertising campaign. It is only in very limited circumstances—*e.g.*, ads depicting unsafe activities for children (see *AMF, Inc.*, 95 F.T.C. 310 (1980))—that an unfairness approach will some times represent the most logical course. Moreover, it seems highly unlikely that either Congress or the courts would tolerate an adventuresome foray by the agency in this area, even if some future Commission had the temerity to try it. If there is some continuing concern about this issue, I would suggest that it be addressed by including language in the committee report indicating the reach of unfairness vis-a-vis advertising.

DECEPTION

Turning briefly to deception, I continue to believe that legislative redefinition, or codification, of this standard is unnecessary and unwise at this time. To the extent there is a problem, it is one of application in particular cases, not a fundamental defect in the current legal standard. Even a change in the law will necessitate giving the Commission and the courts considerable flexibility in ascertaining the meaning of ads. It is in that range of discretion that disputes are most likely to arise. In my view, the best way to make sure that the deception standard is being sensibly applied is to have the Commission prepare a policy statement, much as we did on unfairness, pulling together the various legal elements and case precedents on this subject. This exercise would help clarify the current state of the law and assist the agency in pursuing a consistent course. Coupled with the recently approved review of our ad substantiation program, we would have the basis for a thorough updating of Commission enforcement policy concerning deceptive advertising.

PROFESSIONS

With respect to the proposed professions exemption, there is little to add to what the Commission has said on many previous occasions. Suffice it to say, I am convinced that our activities affecting the professions have represented some of the best work done by the Commission. Not only would an exemption undeservedly exempt a major sector of the economy from Commission scrutiny, but it would also set an extremely bad precedent that could ultimately affect the viability of other Commission enforcement activities.

I might add that a careful review of recent Commission action in this area should put to rest any notion that the agency is insensitive to the special character of professional conduct and competitive behavior. In particular, I refer the subcommittee to two adjudicative opinions, an amicus filing before the Supreme Court and an advisory opinion, all issued since Congress considered the professional exemption proposal last year. *Indiana Federation of Dentists,* Docket No. 9118 (Feb. 17, 1983); *Michigan State Medical Society,* Docket No. 9129 (Feb. 17, 1983); Brief for the United States as Amicus Curiae *Jefferson Parish Hospital Dist. No. 2* v. *Hyde,* (Sup. Ct. Docket No. 82-1031); Request by Burnham Hospital for Advisory Opinion (Opinion Letter issued Feb. 24, 1983).

These actions, I submit reflect both the need for continued Commission jurisdiction over the professions and the agency's willingness to take into consideration any unique competitive factors involving these organizations.

If Congress concludes that some narrowing of the Commission's jurisdiction is in order, the appropriate alternatives are either the amendment offered by Senator Rudman or the proposal advanced by Congressmen Dingell, Florio, Broyhill, and Lent. I would oppose any amendment that seeks to go beyond the scope of these alternatives.

CIVIL PENALTIES

Finally, I would like to express my reservations about the proposal to impose a $1 million cap on civil penalties. It is true that most of the civil penalties obtained by the Commission have fallen in the $100,000 range or below. That is because many of the cases have involved relatively small companies, particularly in the credit or debt collection areas, and the violations have not always been egregious.

On the other hand, where fraud or other serious consumer injury is present, a $1 million ceiling may be clearly inadequate. While there have been only a couple of cases where the courts imposed penalties of more than $1 million, that fact hardly justifies a prohibition on the agency obtaining such relief. If anything, it suggests that the Commission and the courts have not abused their authority. Unlike other Commission enforcement actions, civil penalties can be obtained only after review by the Commission, the Justice Department and the courts. With those kinds of checks on the process, there would appear to be little need for any further restrictions on the Commission's remedial powers. Nevertheless, I would be willing to settle for a penalty ceiling if it were substantially above the $1 million figure.

Mr. Chairman, that concludes my remarks. I will be happy to respond to any questions from you or other Members of the subcommittee.

SEPARATE STATEMENT OF COMMISSIONER CLANTON CONCERNING KELLOGG CO., ET AL., DOCKET NO. 8883

This case raises important issues concerning the application of Section 5 of the FTC Act to oligopolistic conduct. Because of these issues and the present posture of this case—Administrative Law Judge Berman's decision in favor of respondents coupled with the Bureau Director's decision not to appeal—it seems highly desirable for the Commission to determine now whether a full briefing on the merits is warranted.

Of course, even in the absence of an appeal, the Commission has the right under Section 3.53 of the Rules of Practice to undertake a thorough review of the record. However, I believe the circumstances of this case justify an exception to that practice. Given the theories of liability and proposed relief under consideration, it is entirely proper for us to see if there is a likely basis for issuing an order, even if the facts conform closely to what complaint counsel contend.

After having reviewed the parties' most recent submissions, in response to the Commission's order of December 18, 1981, as well as other parts of the record, I cannot find a basis for continuing the case. In its most succinct form, complaint counsel urge that liability be premised on the basis of two related but distinct theories. The first is a traditional conspiracy to monopolize based upon principles contained in Section 2 of the Sherman Act; the second is a shared monopoly theory under Section 5 of the FTC Act, a theory which does not depend upon a showing of collusion. Under either of these theories, complaint counsel argue that the only effective form of relief would be a divestiture order, including royalty-free licensing of respondents' cereal trademarks.

As to the first theory, I agree with ALJ Berman that a conspiracy to monopolize was not property pled. As for the separate shared monopoly theory, I do not believe such a theory, however characterized, can serve as a predicate for the Commission to restructure an industry, at least in the absence of clear predatory behavior, which is not claimed here.

I do want to emphasize, however, that Section 5 may well provide the Commission with sufficient authority to attack non-collusive behavior that contributes to or enhances anticompetitive conduct, and which is without compelling business justification. In such circumstances, the principal remedial tool for dealing with this kind of behavior would be a conduct order.

Before elaborating further on these points, I would offer a comment about the characterizations, or mischaracterizations, that have been advanced in the past by critics of this case. An awful lot of rhetoric has been spilled on this subject, with some critics claiming that the case is just the first step in a broad-based attack on concentrated industries. Others have accused the agency of attacking competitive forms of behavior, such as product differentiation and brand proliferation; while still others have derided the "shared monopoly" concept, suggesting that this is evidence alone of the Commission's confused thinking since the description itself is a contradiction in terms.

Suffice it to say, I do not share all of the views of the critics of this case. In issuing the complaint, I think the Commission sought to address a legitimate concern, not about oligopolies *per se*, but rather about oligopolistic behavior that is uniquely anticompetitive. Respected antitrust commentators of different persuasions—such as Professor Posner and Professors Areeda and Turner—have advocated different approaches for dealing with collusive-type behavior among oligopolists.[1] Whether the theories of relief proposed by complaint counsel are proper is one thing, but it is clear to me that the Commission was not attempting through this case to challenge structure or bigness *per se*.

CONSPIRACY TO MONOPOLIZE

As one of their principal prongs of liability, complaint counsel now contend that an implied conspiracy to monopolize can be inferred from respondents' course of dealing over the past 20 years. It is contended that respondents have consistently eschewed various forms of price competition and channelled their energies instead into promotional activities and brand diversification.[2] Whether this conduct gives rise to a conspiracy to monopolize can be addressed only if a conspiracy in fact was properly tried.

In finding that a conspiracy theory was not part of the case, ALJ Berman looked to the language of the complaint and statements made by complaint counsel during the prehearing conference stage of the proceedings. In particular, he found the complain ambiguous, since it didn't mention specifically that either an agreement or conspiracy was at issue. Rather, the complaint charge, inter alia, that respondents "individually and collectively, have obtained, shared and exercise . . . monopoly power in, and have monopolized, the production and sale of RTE cereal . . ." (Complaint, ¶9B). More importantly, ALJ Berman noted that complaint counsel had emphatically denied on several occasions early in the proceedings that the complaint contained a conspiracy count. (I.D. at pp. 3-10) Thus, although the first ALJ (Judge Hinkes) subsequently allowed the case to be tried on a tacit conspiracy theory, ALJ Berman found that procedure deficient since the complaint was not amended by the Commission and respondents did not acquiesce to that procedure. (See Rules of Practice § 3.15)

A review of the record indicates that, at best, the conspiracy pleading issue is murky. Obviously, we should not engage in excessive nitpicking of pleadings or overly technical interpretations, but the pleadings are not a model of clarity, especially in light of the shared monopoly therory being alleged. Words such as "Combination" and "collectively" are used in the complaint, but those words are also consistent with a shared monopoly theory that requires no showing of collusion. Nevertheless, the pleadings might have been adequate to encompass a conspiracy to monopolize theory had it not been for complaint counsel's insistent denials that a conspiracy was at issue in the case.

During the prehearing conferences in 1972, ALJ Hinkes on more than one occasion sought further clarification of the pleadings from complaint counsel in view of their simultaneous denial of conspiracy and assertion that the case focused on joint, interdependent conduct. (Tr. 17, 25, 71, 104) After several tries, complaint counsel finally indicated that the case could emcompass a tacit agreement (Tr. 106-08, 163-64), but only after having previously indicated that no traditional conspiracy was being alleged.[3]

Of course, as ALJ Berman noted, traditional conspiracies, under either Section 1 or Section 2 of the Sherman Act involve both express and tacit agreements. Thus, it seems hard to conclude that the case, as originally envisioned, encompassed a traditional Sherman Act-type conspiracy. Yet, that is precisely what complaint counsel now contend has been established in this case—a traditional Section 2, Sherman Act conspiracy to monopolize. (Complaint Counsel's Proposed Conclusions of Law, Vol. IV at 655-90, Sept. 30, 1980). Even giving the benefit of the doubt to complaint counsel, it is hard to understand why it was necessary to dance step around the conspiracy issue if the case clearly covered it. After all, the major case now relied upon by complaint counsel, *American Tobacco Co.* v. *United States,* 328 U.S. 781 (1946), which was decided twenty-five years before this case was brought, involved an implied conspiracy to monopolize. While there have not been many implied conspiracy cases brought under Section 2, there certainly have been numerous such cases under Section 1, and complaint counsel, in fact, cite to such precedent in support of their case.

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[1] See P. Areeda and D. Turner III "Antitrust Law," Ch. 8E (1978); R. Posner, "Antitrust Law: An Economic Perspective," 39-77 (1976).

[2] Complaint counsel's conspiracy case depends primarily upon a showing that respondents' roughly parallel bahavior on several fronts—instituting price changes, stopping trade deals, eliminating in-pack premiums, refusing to sell to private labelers, fortification—over a 20-year period cannot be explained away as a coincidence of independent judgments. While it is unnecessary to delve into this issue at any great length, since the conspiracy theory, as discussed hereinafter, is not properly before us, I would observe that this kind of evidentiary approach to proving collusion is not unprecedented. Cases such as *American Tobacco* v. *United States*, 328 U.S. 781 (1946) and *Wall Products Co.* v. *National Gypsum Co.*, 326 F. Supp. 295 (N.D. Cal. 1971), indicate quite clearly that conspiracy can be inferred from proof of parallel actions coupled with economic conditions that appear to negate an inference of innocent, independent business conduct. This point is not to suggest that the case before us unquestionably involves a conspiracy, for, among other things, the evidence of simultaneity of behavior, (e.g., price leadership) here is perhaps not as strong as it was in the aforementioned cases. What it does suggest is that a conspiracy theory is not impotent to deal with oligopolistic behavior that exhibits more than a casual trend toward interdependent conduct.

[3] Although the pleading issue was not before the court, it is interesting to note that the D.C. Circuit Court of Appeals, in a subpoena enforcement action brought four years after the case was filed, observed that a conspiracy was not alleged in the complaint. *FTC* v. *Lonning*, 539 F. 2d 202, 204, n. 3 (D.C. Cir. 1976).

Perhaps, in denying that a conspriacy was at issue in the case, complaint counsel may have been attempting to distinguish between Section 1-type conspiracies and Section 2 conspiracies. There is, however, no evidence of that and, in any event, such a distinction would appear to be unnecessary since the type of proof needed to establish a conspiracy would appear to be much the same regardless of which provision of the Sherman Act was being pleaded. See P. Areeda and D. Turner, supra, note 1, ¶839. Alternatively, complaint counsel may have felt that the kind of tacit conspiracy they had in mind would not rise to the Sherman Act level, but if that is the case then the issue is little different from the pure Section 5 shared monopoly theory discussed below. There can hardly be two kinds of conspiracies, one sufficient to establish Sherman Act liability and another sufficient for Section 5 purposes.

To be sure, there have been suggestions that the scope of the conspiracy theory under the Sherman Act could be broadened to give greater emphasis to the use of economic evidence in determing whether a tacit conspiracy exists. See R. Posner, supra note 1, at 71-77. Still, the issue is whether a conspiracy exists, not whether some other theory, by a different name, is viable.

Although ALJ Hiinkes ultimately allowed the conspiracy charge to be tried, it is clear that the parties did not agree on this procedure and that no amendment to the complaint was sought from the Commission. Accordingly, I do not believe the Commission can hinge liability on a conspiracy theory.

SECTION 5 SHARED MONOPOLY

Even if a conspiracy count is not present, that does not end the matter. Complaint counsel alternatively argue that even absent a conspiracy the conduct is sufficiently like one to justify a finding of liability under Section 5 of the FTC Act. It is quite clear, of course, that Section 5 can reach anticompetitive behavior that is not covered by the Clayton or Sherman Act. And, I believe such authority extends to noncollusive, marketwide behavior that may not involve traditional forms of predation.[4] Presumably, this could include behavior that would not be illegal for a single firm to engage in but, due to the industrywide nature of the practice, could lead to significant anticompetitive effects.

Various commentators have also urged that the antitrust laws are flexible enough to deal with shared monopolies or oligoloplistic behavior outside the context of a traditional conspiracy.[5] In highly concentrated industries competitors may learn to react to each others' moves in a fashion that is closely analogous to the workings of a cartel. Firms will recognize that it is not in their self-interest to chart an independent course because other competitors will be able to quickly detect and match their moves, thereby leading to lower profits for the idustry as a whole. The degree to which this phenomena occurs, and its success, are obviously subjects of great debate and the identification of markets in which firms are operating in a closely interdependent fashion is admittedly complex.

Because of the difficulties in proving collusion, Professors Areeda and Turner have advocated a different approach to the problem of single firm monopolization and shared monopolies. In their recent treaties, they suggest that evidence of persistent monopoly performance in a market, whether exhibited by a single firm or small group of firms, should be sufficient to justify sweeping relief in the form of divestiture or other like remedies. Of course, they would require fairly strong evidence that the market is performing badly and that structural remedies would not lead to inefficiencies. They also believe that such actions should be limited to government initiatives and not allowed in private suits. In essence, their proposal does not depend on improper conduct for establishing liability and is akin to various no-fault monopoly proposals that have ben advanced in the past.

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[4] See, e.g., Boise Cascade Corp., et al., 91 F.T.C. 1 (1978), rev'd on other grounds, *Boise Cascade Corp.* v. *FTC,* 637 F.2d 573 (9th Cir. 1980).

[5] E.g., P. Areeda and D. Turner, supra, note 1; L. Sullivan, "Handbook of the Law of Antitrust," § 125 (1977).

But even Areeda and Turner recognize that the kinds of markets that might warrant intervention under such an approach are limited, even more so in the shared monopoly area than for single firm monopolies.[6]

Complaint counsel, of course, are not advocating a no-fault approach in this case. Instead, they have attempted to develop their case in a way that focuses on the extent to which respondents' interrelated behavior has exacerbated competitive problems in the RTE cereal industry. Their theory depends less on the unreasonableness of specific forms of behavior than it does on the totality of the conduct.

Nevertheless, even under complaint counsel's theory, one must recognize the implications of using such an approach to restructure an entire industry. As complaint counsel acknowledge, the kind of theory and relief they are seeking require extensive proof of industry structure, performance and conduct. While the kind of analysis is highly commendable, it provides a less than certain guide as to what kinds of conduct or market conditions would he subjected to antitrust attack. In addition, such an approach, of necessity, dramatically limits the number of instances where market intervention is warranted and, even then, it does not fully remove the risks associated with developing a structural remedy for an industry.

Thus, absent collusion of clear evidence of predatory behavior, I believe it would be unwise for the Commission to seek dissolution of an industry on the basis of the cumulative effects of multi-firm behavior. That does not mean, however, that such behavior would go unaddressed. Rather, it means that the kind of relief sought—namely, conduct remedies—would reflect two realities about the oligopolistic market context: (1) the lower probability that serious anticompetitive problems will exist for long and (2) the potentially greater costs of attempting to restructure an industry. Because of the complexity involved, it may take many years to recover the costs of obtaining and implementing a sucessful dissolution order. Those costs may be worth incurring where we can be fairly confident that the market behavior under attack cannot be justified. The rigor of conspiracy analysis can help to provide that assurance, and strong evidence of predatory behavior may also provide the necessary predicate for divestiture.

But to pursue structural relief in less compelling circumstances carries with it too great a risk of wrong or imperfect judgements. The alternative, conduct relief, obviously has its limitations. Such a focus, however enables more precise judgements to be made about the reasonableness of particular behavior with the risk of overkill.[7] To be sure, conduct relief may not be feasible in all oligopolistic market settings, but neither is divestiture. After all, antitrust deals primarily with probabilities. Where the probable benefits of improving competition are very high, as they are in breaking up a horizontal price-fixing conspiracy, there is little risk that the imposition of harsh sanctions will chill desirable competitive behavior. But, as the difficulty of distinguishing between harmful and beneficial conduct increases, so does the danger of imposing maximum remedies. Therefore, in my view, remedial restraint is called for, even in the kind of tightly concentrated market presented to us here, where profitability is good, market shares are stable and new entry has been minimal.

Although I am opposed to structural remedies, I reiterate my belief that the Commission can reach non-collusive, industrywide behavior under Section 5 of the FTC Act. An example of such an approach is the Commission's decision in *Boise Cascade*, 91 F.T.C. 1 (1978), rev's, *Boise Cascade Corp.* v. *FTC*, 637 F.2d 573 (9th Cir. 1980). There, the Commission found that the industrywide use of an artificial freight factor contributed to price stability and could not be justified by market exigencies. Although the Ninth Circuit Court of Appeals felt that the Commission did not make a satisfactory showing of anticompetitive effect, the appellate decision did not foreclose the possibility that the Commission could employ Section 5 to reach unjustified forms of non-collusive behavior which are practiced on a marketwide basis. It should also be emphasized that the Commission in *Boise Cascade* believed that it could fashion an effective conduct order that would not be highly regulatory in nature. If conduct relief can be easily evaded, or requires extensive government intrusion in ongoing market operations, there is little reason to press ahead. And, the absence of effective relief may suggest that there are offsetting competitive justifications for the practices under scrutiny.

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[6] See P. Areeda and D. Turner, supra, note 1, ¶ 845.

[7] Apart from their suggested approach for dealing with persistent shared monopoly, Areeda and Turner also have expressed the view that the antitrust laws even more clearly can reach exclusionary behavior engaged in by shared monopolists. Such a theory would, they believe, amount to a logical extension of attempted monopolization, since the primary missing ingredient would be the absence of a dangerous probability of a single firm monopoly. P. Areeda and Turner, supra, note 1, ¶856–61. Whether the courts would be willing to extend Section 2 of the Sherman Act this far is not clear, but, in any event, such an approach would appear to be within the scope of § 5 of the FTC Act.

As reflected in the *Boise Cascade* decision, the Commission may address multifirm behavior that facilitates non-competitive conduct as well as more exclusionary forms of conduct. On the other hand, simply refusing to compete, by itself, probably would not be subject to attack—to do so would be analogous to going after a passive monopolist. However, passivity in an oligopolistic context is harder to maintain without resort to collusion or other practices that may contribute to a stable market.

In this instance, assuming complaint counsel's case were to be established, several practices might be singled out for possible action. For example, a central issue in the case is brand proliferation. Complaint counsel argue that respondents have engaged in excessive product differentiation as a less disruptive form of competition than price competition. It is claimed that by carving up the market into smaller and smaller product segments, respondents have made it extremely difficult for new firms to enter, since an entrant would have to offer several brands to achieve minimal scale economies. Moreover, a new firm could not expect established competitors to give much ground, as might be the case if limit pricing were being practiced, because of the difficulty of repositioning brands.

Without getting into an exended discussion of these allegations, there does seem to be considerable evidence that brand proliferation has made entry more difficult. But that is not the end of the analysis. Whatever the social value of these products, we are not dealing with the kind of product design of change that is introduced primary as a blocking device to discipline competitiors.[8] In other words, we are not talking about predatory conduct that serves little, if any legitimate competitive ends. For the most part, the myriad cereal brands on the market are self-sustaining and they appear to generate significant consumer demand. Even if we would prefer to see fewer brands and more price competition, it would be extremely difficult to distinguish between legitimate and illegitimate brand proliferation. Certainly, it would be quite inadvisable and impractical to attempt to limit advertising expenditures or new brand offerings. Thus, an order provision directed to this practice does not seem very promising.

A second practice that might be susceptible to correction concerns respondents' shelf space recommendations to grocery retailers. These plans rely largely on past market shares as the benchmark for allocating space. Complaint counsel contend that these recommendations, which many retailers have adhered to in principle, tend to stabilize competition among existing competitors and make it more difficult for new entrants to get shelf space. Indeed, this is the only practice for which complaint counsel have sought conduct relief.

It would be argued that an order restricting or preventing respondents from making shelf space recommendations would help to inject more competitive pressures into an important area of non-price competition, without intruding unnecessarily into respondents' day-to-day business judgments. On the other hand, this type of activity is undoubtedly normal commercial behavior that is engaged in by many other food manufacturers, although it is not clear whether the nature and pattern of recommendations in the cereal industry are followed in other markets.

However, regardless of whether a workable remedy could be crafted on this subject, it is questionable whether the issue is all that important from a remedial standpoint. Dr. Schmalensee, one of complaint counsel's expert witnesses in the case, expressed the view in a separate article that shelf space plans were probably not powerful deterrent devices. Schmalensee, "Entry Deterrence in the Ready-to-Eat Breakfast Cereal Industry," 9 Bell J. Econ. 305, 307, n. 4 (1978).

A third area for possible relief involves the exchange of recent advertising expenditure data among respondents through the vehicle of a third party reporting service. It is not entirely clear whether this particular practice, specifically with respect to the accuracy and currency of the data exchange, is unique to the cereal industry or occurs frequently in other industries. While this exchange makes it easier to monitor the actions of competitors it may be less sensitive than an exchange of price information, since the quantity of advertising expenditures does not necessarily reveal the effectiveness of those expenditures. Of course, the effectiveness of restricting this practice depends on how easily and quickly respondents could obtain similar data through other means.

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[8] Allegations of this nature have been made in several recent cases involving the communications and computer industies. *Northeastern Tel. Co.* v. *American Tel. & Tel. Co.,* 497 F. Supp. 230, 244 (D. Conn. 1980), rev'd 651 F.2d 76, 94–95 (2d Cir. 1981); *Berkey Photo, Inc.* v. *Eastman Kodak, Co.,* 603 F.2d 263, 285 (2d Cir. 1979), cert. denied, 444 U.S. 1093 (1980); *Cal. Computer Products* v. *I.B.M. Corp.,* 613 F.2d 727, 744 (9th Cir. 1979); *Transamerica Computer Co., Inc.* v. I.B.M. Corp., 481 F. Supp. 965, 1006–08 (N.D. Cal. 1979).

But, even if an order restriction would make that task substantially more difficult, it is not at all clear that it would inject a very significant destabilizing force into the market. To be sure, advertising is a major factor in respondents; non-price competition, but inducing more rivalry in this area is not necessarily calculated to produce similar spin-off effects in the pricing of RTE cereals.

Another candidate for reform is respondents fairly consistent refusal to supply private brand cereals to retailers. While increased private brand competition could bring about more price competition, an order requiring respondents to supply such product is fraught with all kinds of problems, and could easily lead to a highly intrusive regulatory-type order.

Finally, with respect to other allegedly anticompetitive conduct, such as respondents' refusal to offer trade deals or other off-list discounts, it is quite clear that the Commission cannot mandate respondents to compete. Such behavior, if it does not involve collusion, represents the kinds of passive noncompetitive behavior noted above for which there is probably no practical enforcement remedy.

Thus, a review of possible avenues for conduct relief suggests that, assuming a Section 5 case can be made out, the available remedial alternatives are either intrinsically undesirable or hold little promise for producing beneficial results. To some extent, this task is made more difficult by the fact that there is no record for determining which, if any, conduct restrictions would be useful, since the case from the outset focused almost exclusively on structural remedies. Nevertheless, despite this limitation, I am inclined to agree with complaint counsel that if any relief were suitable in this case, it should probably be structural in nature. However, for the reasons discussed previously, I am firmly opposed to seeking dissolution in a case of this kind without collusion, or possibly predation, as a legal predicate. While we might desire a better mix of price and non-price competition in the RTE cereal industry, the potential costs associated with a divestiture order, not to mention the difficulty in getting a court to approve such an exercise of our remedial discretion, lead me to reject this approach. I am also simply not persuaded that the class of cases reflected here is sufficiently large to warrant pursuing this kind of complicated, time-consuming remedial avenue. Even if this is the one case in a thousand that might justify such an approach, I do not feel that we ought to apply our Section 5 powers in this way, for what would be an essentially one-time, ad hoc law enforcement initiative.

Accordingly, it is my belief that the Commission should not pursue this case further.

[The following information was subsequently received for the record:]

Question of the Majority and the Answer Thereto

Question. Please describe any ideas you may have for statutorily expanding the authority of the Commission or improving Commission procedures or remedies so that the Commission may be more effective in protecting consumers.

Answer. As I stated in my prepared statement I believe that the primary objective of the Commission should be to obtain permanent authorization for some reasonable period of time to enable us to return our full attention to substantive law enforcement. For this reason, I am very reluctant to suggest any additional changes to our authority as it may hinder our ability to bring the reauthorization issue to a much needed conclusion.

After we have the reauthorization process behind us, I would be willing to explore new ideas regarding our authority, including the possibility of amending our statute to allow us to order consumer redress or restitution in a section 5 administrative proceeding. At present, we can seek redress only in a separate court proceeding after liability has been established. Moreover, redress is limited to "dishonest" or "fraudulent" conduct. In practice, this scheme has made it very difficult to obtain effective redress, although the Commission has been able to obtain limited redress in negotiated settlements. However, our negotiating posture is obviously weakened by the two-step litigation procedure required by current law. If the statute were amended, as I have suggested, respondents would still be afforded full court review and redress could be limited to serious cases, i.e., where the firm knew or should have known that its practices were likely to harm consumers. A legal standard incorporating knowledge as a necessary predicate to liability would be preferable to the vague "dishonest" or "fraudulent" standard in the current law.

QUESTIONS OF THE MINORITY AND THE ANSWERS THERETO

Question. Please give the Committee your views on the proposed funeral rule.

Answer. I voted for the funeral rule and continue firmly to support it. I believe the rule represents a reasonable, balanced response to the demonstrated difficulty that consumers face in getting accurate, useful price and other information concerning funeral goods and services. I also believe that the rule can be a helpful model to states that may be considering legislation in this area.

Question. Do you agree that the Supreme Court in Dr. Miles and subsequent cases established as the law of the land that resale price maintenance is per se illegal?

Answer. In my view, resale price maintenance is *per se* illegal under established Supreme Court precedent. Although the Court moved to a rule-of-reason approach for non-price restraints in *Continental T. V., Inc.* v. *GTE-Sylvania, Inc.*, 433 U.S. 36 (1977), it specifically did not include RPM. Subsequently, in *California Retail Liquor Dealers Association* v. *Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), the Court indicated that RPM was still illegal per se. The Court now has before it a case in which the Department of Justice has urged that the per se standard be abolished. *Spray Rite Service Corp.* v. *Monsanto Co.*, (N.D. Ill. 1980), aff'd, 684 F 2d (8th Cir. 1982), cert. denied, 51 U.S.L.W. 3627 (U.S. March 1, 1983) (No. 82-914). Whether the Court decides to address that issue remains to be seen.

Question. Do you agree that your enforcement of resale price maintenance has diminished substantially?

Answer. The number of consents and complaints involving RPM has declined somewhat in the last couple of years. This decline may be attributed to a number of factors including the effect of earlier successful enforcement efforts in this area by the states and private parties as well as the federal government and the per se nature of the legal standard, i.e., few firms are willing to risk litigation. Thus, our initial investigations in this area have indicated that, at least for the present, it appears unlikely that there will be any substantial recurrence of RPM.

Question. In your opinion, is there any justification whatsoever for a manufacturer setting and enforcing a minimum sales price for its goods?

Answer. The argument is made that RPM serves many of the same purposes that are served by non-price restraints, e.g., inducing dealers to provide more pre- or post-sale services. Although there may be some validity to this argument, at least in certain cases, the practice seems even more likely than non-price restraints to have adverse competitive effects, e.g., making it easier for manufacturers or dealers to monitor prices and engage in tacit collusion. In a dominant firm situation, where collusion is not the primary concern, RPM may make it easier for the dominant firm to exercise market power, although it can be argued that the dominant firm could achieve that result simply by charging higher wholesale prices to its distributors.

As I have indicated previously in a recent article "Evolving Antitrust World Could Use FTC Guidance," Legal Times (March 21, 1982), (Appendix B)[1] and in remarks I delivered to the Fifteenth New England Antitrust Conference on November 13, 1981, (Appendix C), I am presently unwilling to back away from a per se approach until there has been a systematic review of the evidence and theories on this issue. The Bureaus of Economics and Competition have a comprehensive study underway to explore these questions.

Question. Should injury to business competitors or injury to the marketplace by a deceptive ad be examined by the FTC?

Answer. From the standpoint of prosecutorial discretion and resource allocation, I believe we should bring cases that are significant, i.e., those that cause some degree of harm or injury. However, I do not believe that the definition of harm or injury should be defined only in quantitative terms or limited to monetary loss. As for the legal standard, I believe that the element of injury is already incorporated into current deception law, namely that consumers must be reasonably misled and that the deception be material.

Question. What effect will defining "deception" have on the ad substantiation program if the current restrictions on "unfairness" jurisdiction over commercial advertising are continued?

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[1] The appendices have been retained in the committee files.

Answer. While I oppose a statutory redefinition of deception, I do not feel that Chairman Miller's proposed definition would impair our ad substantiation program, even if the current restrictions on unfair commercial advertising are retained. Commission and court decisions have made clear that our jurisdiction over unsubstantiated claims rests on deception as well as unfairness principles. See e.g., *Sears, Roebuck & Co.*, 95 F.T.C. 406 (1980), aff'd, No. 80-7368 (9th Cir. May 6, 1982); *Jay Norris Corp.*, 91 F.T.C. 751 (1978), modified, 598 F.2d 1244 (2d Cir.), cert. denied, 444 U.S. 980 (1979); *Porter & Dietsch,* 90 F.T.C. 770, 866 (1977); *Nat'l Comm. on Egg Nutrition,* 88 F.T.C. 89 (1976), modified, 605 F.2d 294 (7th Cir. 1979), cert. denied, 445 U.S. 950, (1980), see also *Nat'l Comm. on Egg Nutrition,* 88 F.T.C. 89 (1976), modified, 570 F.2d 157 (7th Cir. 1977), cert. denied, 439 U.S. 821 (1978).

Question. In your opinion, would setting standards concerning deceptive practices minimize uncertainty?

Answer. The main reason that I oppose a legislative redefinition of deception is that it seems unlikely to add much clarity to the law. The proposals advanced would still require considerable discretion to be exercised by the Commission and the courts in determining whether an interpretation of an ad is reasonable and whether consumers are likely to be harmed.

Question. How would defining "deception" affect the FTC's authority over statements which are deceptive by omission?

Answer. It is not at all clear how a statutory amendment would affect the deception-by-omission problem. The proposals I have seen don't explicitly address this problem. Most of the difficulties arise in determining whether the failure to disclose information is deceptive or unfair. New legislation is unlikely to resolve this issue.

Question. What effect would Chairman Miller's proposal have on deceptive practices (other than advertising) challenged by the Commission?

Answer. I doubt that Chairman Miller's proposal would have any different effect on non-advertising forms of deception. Basically the same considerations are at stake in both situations.

Question. Would you oppose an extension (for the life of the authorization) of the 1980 Act's agricultural cooperative provision?

Answer. While I think the restriction on Commission studies of agricultural marketing orders is unwarranted, I do not object very strongly to extension of the 1980 Act's provisions.

Question. Would you object to a permanent provision for a legislative veto?

Answer. As I have previously stated, I have considerable reservations about a legislative veto but do not oppose a permanent veto provision, if that is Congress' will.

QUESTIONS OF SENATOR LAUTENBERG AND THE ANSWERS THERETO

Question. Several members of Congress have expressed their concern about Chairman Miller's professed intention to exercise his "prosecutorial discretion" in enforcing the antitrust law governing resale price maintenance. In particular, many members from New Jersey have inquired about the status of the Commission's response to complaints by the Burlington Coat Factory, a clothing retailer, that it has been the victim of illegal resale price maintenance. In light of this Congressional concern, would the members of the Commission, individually or jointly, set forth publicly, and in clear detail, the standards it intends to apply in determining whether, in a given case, it is in the public interest to enforce the law prohibiting resale price maintenance?

Answer. If a vertical price fixing agreement is uncovered, I believe the Commission should take action in most instances. However, even though RPM is per se illegal, the Commission may properly decide to exercise its prosecutorial discretion and not pursue a particular case, e.g., where RPM was in existence for a short period of time but has ceased or where an insignificant amount of commerce was involved. Also, there may be situations where a new firm uses vertical price restraints temporarily to assist entry. (See Statement of former Commissioner Robert Pitofsky before House Subcommittee on Monopolies and Commercial Law, March 9, 1983, p. 14). Thus, the per se standard can accommodate sensible exercise of prosecutorial discretion at the margin. In these cases the harm is not so egregious as to evoke the per se sanctions necessary for violations such as horizontal price fixing. Thus, as I mentioned in response to other questions from the Committee and in the attached Legal Times article, I believe a per se illegal standard should continue to apply to RPM for the present, at least until we have had an opportunity to thoroughly review the pros and cons of moving to a rule of reason. The study of RPM being conducted by the Bureaus of Economics and Competition should provide some helpful analysis and direction in this area.

Question. Would the Commission also furnish statistics for each of the last five full years, plus the year to date, on the following:

The number of cases subject to a so-called "100-hour investigation" or preliminary investigations in which resale price maintenance was alleged;

The number of cases subject to a formal investigation in which resale price maintenance was alleged;

The number of complaint recommendations tendered by Bureau of Competition staff to the Commission in which resale price maintenance was alleged;

The number of complaints issued by the Commission in which resale price maintenance was alleged; and

The number of consent agreements entered involving resale price maintenance.

Answer. It is my understanding that the Commission's response to this question will be included in Chairman Miller's submission to the Committee.

Question. Do you believe the FTC has systematically misapplied the deception doctrine?

Answer. Although in the past the Commission may have brought deception cases where there was little or no consumer injury or where the legal standard was improperly applied to the facts, I believe these cases are clearly not representative of any systematic misapplication of the law. However, it would be useful for the Commission to publish a policy statement, along the lines of our 1980 Statement on the Commission's Consumer Unfairness Jurisdiction, describing the principles it applies in bringing deception cases. As you know, this is an approach I advocated, in lieu of legislation, before this Subcommittee during hearings last summer regarding the Commission's jurisdiction over deceptive acts and practices.

The CHAIRMAN. Thank you.

Mr. PERTSCHUK.

Mr. PERTSCHUK. Mr. Chairman, you have indicated the time is short. I will just add a couple of points. Essentially, I would join in your opening statement and the comments you made about the need for this committee. I would note that Senator Kasten mentioned that the need is for the committee to obtain some balance between business demands and consumer needs. With all due respect to the committee, Mr. Chairman, it does seem to me that in the last several years the balance has tipped heavily in favor of business demands rather than the consumer interest.

The CHAIRMAN. Is that all you are going to say?

Mr. PERTSCHUK. Yes, sir.

The CHAIRMAN. Mike, that is the first time I have heard you speak that briefly in years.

[The statement follows:]

STATEMENT OF MICHAEL PERTSCHUK, COMMISSIONER, FTC

Mr. Chairman, I can still remember a time when the principal focus of debate in the Senate Commerce Committee was how to strengthen consumers' rights in the marketplace. In the past few years, the Committee has displayed exquisite sensitivity to the needs and demands, of, among others: Phillip Morris and Brown & Williamson, Kellogg's and General Mills, Grey Advertising, the Toy Manufacurers of America, the American Medical Assocaition, the Texas Bar Association, the National Council of Farmer Cooperatives, Sunkist, Aetna Life and Casualty Insurance Company, the National Automobile Dealers Association, the Proprietary Drug Association, and the National Association of Broadcasters.

But not the consumer.

Mr. Chairman, your leadership gives us hope that the time has come again when the Committee will place the interest of consumers uppermost in its deliberation. Once again, recent national polls remind us that an unwavering majority of the American public demand stronger consumer regulation. The most recent exhaustive poll commissioned by Arco and conducted by Louis Harris found:

—That 59 percent of persons surveyed thought government had not done enough about requiring companies to live up to their advertising claims.

—That 51 percent thought government had not done enough to guard against inadequate guarantees and warranties; only 5 percent thought government had gone too far.

—That 48 percent throught government had not done enough about dangerous products; only 12% thought government had gone too far.

Overall, 69% of the public felt government regulation to protect consumers was about right or too little; only 3 percent thought governement had gone too far.

Now let me turn to the provisions in last year's bill reported by the Committee.

PROFESSIONS

In the face of universal condemnation and public outcry, the American Medical Association has apparently abandoned its quest for congressional absolution from the obligations of fair competition and fair commercial practice. I say apparently because it is clear that the AMA now seeks to obtain by indirection what it no longer hopes to gain directly: effective handcuffing of the Federal Trade Commission's law enforcement efforts against anticompetitive professional practices.

Mr. Chairman I urge the Committee to beware of spurious "compromises." A particularly illusory form of compromise circulated by the AMA lobbyists would create an exemption from FTC authority for any conduct "permitted by state law" or any activity by a profession which is the subject of a state regulatory scheme. Every profession is by definition the subject of a state regulatory scheme since state licensing is a prerequisite for qualification as a professional. Some state law and regulating governs certain categories of professional activity in all states. This "compromise" would therefore effectively grant total immunity from FTC action since it is precisely where states have not affirmatively acted to prevent anticompetitive practices that FTC action is most needed.

Virtually all industries are regulated to some extent by state health and safety and other laws and regulations. Yet these categories of state regulation co-exist with federal regulatory standards in such areas as environmental protection, worker and product safety, civil rights, antitrust and consumer protection. At the very least, the ambiguity of proposals which ousts the FTC from jurisdiction over activities for which there is a broadly defined state regulatory scheme guarantees legal chaos.

In the *Professional Engineers* [1] case, the Supreme Court rejected the argument made by engineers that open price competition was harmful to the public's interest because it stimulated competitive pricing—tempting low bidders to reduce quality. The court, in effect, responded that the professional engineers' private vision of the social value of price-fixing could not substitute for the Congressional determination that free and open competition was the law of the land in the absence of specific statutory exemptions. But, another spurious "compromise" proposal would require the Federal Trade Commission to create a defense to the Congressional mandate for open competition on the basis of professional societies' assertions that their anticimpetitive practices enhance other social values. No unelected body of regulators ought to be called upon to create such ad hoc exemptions to the anitrust laws in this way. If Congress of the individual states desire expressly to exempt any particular form of professional collusion or commercial conduct as a matter of state law, they are free to do so under the state action doctrine.

In the House, Congressmen Dingell, Florio, Broyhill and Lent have advanced a sound and genuine compromise on the professions issues, as has Senator Rudman in the Senate. I believe these proposals define the limits of any reasonable exemption for professional activity.

AGRICULTURAL COOPERATIVES

Last year's bill contained a provision that would have effectively kept the FTC from challenging any anticompetitive conduct by an agricultural cooperative. By employing the unusual device of requiring that the Secretary of Agriculture act as an interlocutory judge in Commission proceedings, the proponents of the exemption would guarantee extensive delay in even straightforward jurisdictional determinations. The real question is whether the Commission should be allowed to challenge anticompetitive conduct by agricultural cooperatives which is not exempt from the antitrust laws under the Capper-Volstead Act. If it is Congress desire to prevent the Commission from continuing its activities in challenging monopolization and anticompetitive mergers by cooperatives—conduct which is clearly not immune from antitrust scrutiny—it would be more straightforward, and honest with the public, to exempt agricultural cooperatives altogether, If the Congress (or the public) were presented with a proposal in the form, I believe it would be rejected overwhelmingly.

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[1] *National Society of Professional Engineers,* 435 U.S. 679 (1978).

DEFINITION OF DECEPTIVE PRACTICES

I admire Chairman Miller's tenacity in pursuing statutory standards for the conduct of deceptive practices litigation. Unfortunately, his success would signal a giant step backward for law enforcement and a "new freedom" for false or misleading advertising.

Let me summarize my objections.

First, I think it's simply a myth (and not a very widespread one) that businessmen don't understand what the law prohibiting deception requires of them. The current law isn't some exotic government regulation spelled out over massive pages of the Federal Register. Ask a small businessman. He'll tell you deception means: "Don't lie and don't mislead." Are the Miller/Muris standards going to help clarify and guide the small businessman? Read the proposed amendment and ask yourself, if you were a small businessman planning an ad would you know any more than you already know about deception?

Second, the Miller/Muris proposal is supposedly designed to stop the Commission from bringing silly cases. And out of the hundreds of cases successfully brought or settled by the Commission over the last four decades the Chairman and his colleagues have exhumed a half-dozen or so which they don't like. Give them the benefit of the doubt. Assume that the Commission has brought from time to time a foolish or trivial case. But no definition, ever a clear one, would stop the Commission form bringing silly cases. As long as three members of the Commission vote for a case, no matter what the congressional standard is, the case will be brought. Only good judgment by three Commissioners can prevent the Commission from asinine acts.

So the Chairman's proposal will not define deception clearly and will not prevent the Commission from bringing foolish cases. But it will stop the Commission from winning good and important cases. And chances are that in the hands of skilled lawyers the new statutory definition would trip up the prosecution of the very solid cases that Miller himself supports.

Chairman Miller has testified that it is not his intention that the Commission do exhaustive surveys and research and develop expensive economic data to support run-of-the-mill cases. But let Congress enact this definition and let the Commission bring its first "run-of-the-mill" deception case, and watch the lawyers cry "Whoa! Congress must have had something serious in mind when it changed a 50-year-old law. Where are your nationally projectable surveys proving that reasonable consumers interpreted our ads in the same way you did? Can you prove that your survey surveyed only reasonable consumers? Did you take I.Q. tests? Have you restricted your survey to subscribers of Consumer Reports? Prove that our deception injured consumers. Maybe they were misled by our ads, but were is the injury? The product they brought was o.k.—it worked. Maybe they would have bought the product anyway. Prove that they lost money. Prove that their desire in purchasing our product were frustrated. Maybe consumers lost fifty-cents or a dollar or a dollar-and-a-half by buying a detergent that doesn't quite perform as it was advertised. That is not significant injury."

Chairman Miller is on sound ground when he talks about case selection criteria which guide enforcement decisions to spend our (declining) resources in the most effective way. In that context it makes perfect sense to concentrate on cases where injury is greatest. But there is a wide gulf between an agency's use of case selection criteria which say to our staff: "don't spend time investigating false claims in trivial cases" and Congress changing the law to make some false claims legal.

The Chairman has promised that its management of the Commission would enhance the goal of the "new freedom," just as Woodrow Wilson sought to enhance the freedom of our republic 50 years ago. But whose freedom is enhanced by this definition? Not the consumer's freedom of informed choice. Uphappily the only freedom enhanced by this amendment would be the fringe advertisers freedom to stretch the truth.

Who needs it?

UNFAIRNESS EXEMPTION FOR COMMERCIAL ADVERTISING

The advertising associations and certain business groups, particularly Phillip Morris, Brown & Williamson and the Tobacco Institute, are pressing to exempt commercial advertising from the "unfairness" jurisdiction of the Commission. The primary argument for this exemption is that the Commission's authority is unduly vague, threatens unspecified but terrible Commission action, and is unconstitutional or at least comes pretty close. The flaw in these arguments is that the exemption eliminates all FTC actions based on this authority, not just the ones creative minds could imagine might occur.

Most parents believe, I think, that the government does have (and should have) the authority to stop a beer advertisement showing 15 year olds guzzling beer happily after a ball game or a skateboard ad showing a 9 year old darting through rush hour traffic. The fact is that the principal authority of the FTC to ban such ads is to challenge them on the grounds that they are unfair. Challenging them only on the basis of our deception authority is certainly pressing the outer boundaries of that concept and it's very debatable whether the courts would agree. As our 1980 Policy Statement said, advertisements which depicted young children engaging in unsafe or illegal behavior "could be most readily characterized as unfair."[2] I encourage the Committee to ask the advertising associations if these cases could be brought as "deceptive" cases if the exemption passed and (an even more difficult question) how they could be brought under the advertisers' proposed standard for deceptive practices.

In addition to these cases involving children, the authority to prohibit unfair advertising is necessary to require disclosure of essential information in advertising when the advertisement itself is not considered deceptive. Finally, the adverstising substantiation rule itself, one of the most important applications of Section 5 in the history of the Commission, was first grounded upon the idea of fundamental "marketplace fairness" in *Pfizer, Inc.*[3] While later cases have grounded fhe doctrine in particular situations on our deception authority, this approach still requires that the Commission (with the agreement of the courts) find that an advertisement is "deceptive" because it (falsely) implies an advertiser has substantiation for the ad. Whether the courts would agree that *any* ad, even one which makes a specific claim, makes such an implied representation is uncertain. I would encourage the Committee to ask the advertising associations and Chairman Miller how the Commission would prove an ad substantiation case on the basis of the current law of deception and on the basis of their new complex proposal to define deception.

CAP ON CIVIL PENALTIES

The attempt to have Congress place a ceiling on the maximum penalty a court could impose on a company for violating an FTC rule of order is an effort to apply "negative indexing" of fines for violators. As the value of the dollar declines with inflation, companies who violate the law will find it less and less troublesome to pay even the maximum fine. The cap of $1 million is a large share of a small firm's sales (and so the Commission has never pressed for anything close to this for a small company) but it's still a tiny fraction of a giant firm's profits.

The effort to achieve this limitation on the meddlesomeness of the government began with a federal court ordered penalty in the *Reader's Digest* case of $1.7 million. I wish to remind the Committee that: (1) it was a *court* not the Commission that decided the penalty; (2) the court conducted a careful review of several factors, including the ability to pay, bad faith in violating the order, the large number of deceptive publications which were issued, and the benefit to the company from engaging in the deception; and (3) the penalty amounted to about 10 cents for every deceptive publication—only 2 cents more than the costs of mailing.

As the Committee recognized last year in limiting the penalty cap to consumer protection cases, it can easily be worth more than $1 million to a company to violate an FTC order in the antitrust area by, for example, putting off an ordered divestiture. However, treating a million dollar penalty as an acceptable cost of doing business is possible in the consumer protection area as well. In fact, the *Reader's Digest* case is a perfect example. There the District Court found that the company had spent $1.4 million on postage alone for the mailings that violated the order! Obviously, the company expected the benefit from the violative mailings to be greater than that figure. some of our consent orders required companies to spend millions of dollars in redress for consumers. A company might be willing to drag its feet in complying or refuse to comply altogether if the maximum fine was $1 million. The message Congress will be sending to businesses if it adopts a $1 million cap is: If you're going to violate an FTC order, do it in a big way; even if you get caught, it may be worth the fine.

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[2] Companion Statement on the Commission's Consumer Unfairness Jurisdiction, reprinted in H.R. Rept. 97-809, pt. 1, 97th Congress 2d Sess., September 15, 1982, p. 41.

[3] 81 F.T.C. 23 (1972).

TRADEMARKS

I urge you not to extend the existing moratorium on Commission applications under the Lanham Act for the cancellation of trademarks that have become the common descriptive names of commercial products. Continued trademark protection for names that have become generic can have palpable anticompetitive consequences. The holder of such a mark may be able to command a premium price unrelated to product quality, and the mark may constitute a type of entry barrier in the market. The adverse effect on competition may be particularly severe in the case of a monopolist.

It has been argued that cancellation efforts by private parties are sufficient to remedy the problem of generic marks. However, there are many reasons why private suits may not be filed, particularly by small competitors. They include the costs of litigation (which include not only legal fees but also the costs of relevant market surveys) and the fear of retaliation. Only the FTC has the authority to seek cancellation in pursuit of the public interest in free competition.

AFFIRMATIVE RELIEF

The bill reported by this committee last year included a section forbidding the Commission in consumer protection cases from ordering remedial relief "other than a requirement to discontinue the same or a similar act or practice," unless the Commission performs a cost-benefit analysis. This section might be dubbed the "Economists and Lawyers Relief Act of 1983," since its primary benefit will take the form of increased employment for thse dubiously needy groups.

The law already requires that Commission orders be "reasonably related" to the violations they are intended to correct.[4] In cases involving first amendment considerations, remedies must be "reasonably necessary." [5] The courts have not been reluctant to scrutinize Commission orders to determine whether they meet these standards. Even in the Listerine case, for example, where the U.S. Court of Appeals for the District of Columbia upheld the Commission's corrective advertising order, the court eliminated part of the required message (so-called "confessional preamble") because it found it unnecessary.[6]

I don't think any real case has been made for revising the existing standard for Commission orders—certainly not one that shows that the benefits would exceed the costs! And the costs would be substantial. Cases would be delayed while lawyers, economists, and other experts attempted to tie the Commission in analytical knots. The fact that the future effect of affirmative remedies can never be predicted with precise certainty would chill the Commission in some cases from insisting on effective relief. And the Commission would be encouraged to rely on traditional "tried and true" remedies, to the prejudice of innovative approaches that might be more effective or less burdensome.

PUBLIC PARTICIPATION FUNDING

The business community reacts with horror at the proposition that in some cases the Commission may authorize the use of federal funds to allow consumers or small businesses to participate in Commission rulemaking proceedings. This modest and pragmatic support for the democratic process is too much for the National Association of Manufacturers or Chamber of Commerce to take, even though their expenditures for xeroxing probably exceed the entire budget of many consumer organizations that benefit from this program. Not so long ago, when our perspective on the role of government in our society was different, these highly respected public servants supported the public participation program:

"[T]he experience we have had with public participation confirms Congress' wisdom in including that program in the Magnuson-Moss Act. Public participation contributes materially to ensuring that Commission determinations in rulemaking are based on all of the important information available and a rich diversity of views."—Elizabeth Hanford Dole, June 1979, former FTC Commissioner.

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[4] *Jacob Siegel Co.* v. *FTC*, 327 U.S. 608 (1946); *FTC* v. *National Lead Co.*, 352 U.S. 419 (1957); *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 392–95 (1965).

[5] *United States* v. *Reader's Digest Ass'n, Inc.*, 662 F. 2d 955, 965 (3d Cir. 1981) cert. denied, 102 S. Ct. 1253 (1982); *Beneficial Corp.* v. *FTC*, 542 F. 2d 611, 619 (3d Cir. 1976), cert. denied 430 U.S. 983 (1977).

[6] *Warner-Lambert Co.* v. *FTC* 562F 2d 749, 763 (1977), cert. denied, 435 U.S. 950 (1978).

"Although the program was underway during my tenure on the Commission, I was only exposed to one trade regulation rulemaking record in which assistance had been provided under the program. In that proceeding (Advertising of Ophthalmic Goods and Serviccs . . .) the participation program worked splendidly. Assistance funds brought to the record, and ultimately to the Commission table, diverse, unique and important perspectives and interests which enriched our deliberations and contributed sustantially to the final shape of the rule."—Calvin J. Collier, June 1979, former FTC Chairman under President Ford.

UNFAIRNESS DEFINITION

In my view, there is no need to define statutorily our unfairness authority given the lengthy period over which the law has evolved and the careful explication of the Commission's use of this authority in our policy statement of December 1980. If the step of embodying the authority in a statutory definition is to be taken—with the attendant risks and confusion that future litigation will bring—the Commission's 1980 policy statement is certainly the best basis on which to build.

AUTHORIZATION LEVELS

The Reagan administration took over the FTC determined to slash its already modest budget and to eliminate or dismantle as much as possible its enforcement-minded regional offices, at great cost to the public. Fortunately, the Congress has consistently resisted these efforts, and today there are ten regional offices surviving though procedures were begun earlier this month to eliminate almost 60 regional employees.

In fiscal year 1979, the Commission's total employment level was about 1,780 and the number in the regional offices was about 350. When the personnel reductions are implemented, there will be 169 people left in the regional offices and, under OMB's proposed budget for fiscal year 1984, 1,199 left in the agency. The idea that these drastic reductions are leading to a "lean and mean" agency is grimly comical.

As a result of the strong congressional message to keep all ten regional offices open at least at minimally viable staffing levels, Chairman Miller, in House reauthorization testimony last week, requested higher authorized funding for the FTC in fiscal years 1984 and 1985 (approximately $68 million) than the $59.4 million and $56 million, respectively, that he and the OMB had originally proposed when they were assuming that FTC regional offices would be closed. This is a step in the right direction, but it doesn't go quite far enough. I strongly urge the committee to adopt, at the very least, authorized funding levels of $70.7 million and $75.65 million for fiscal years 1984 and 1985, respectively, which were approved by the House Commerce Committee last fall, and to direct the Commission to staff the 10 regional offices at adequate levels.

LEGISLATIVE VETO

In addition to its likely unconstitutionality, legislative veto creates the worst possible climate for congressional decisionmaking—a limited period of time during which a well funded lobby will descend upon Congress to protect a narrow interest. The result—not always but often—will be the unseemly spectacle of Congressmen, inadequately informed about both sides of the issue, casting a hurried vote to veto a rule promulgated after extended administrative rulemaking based on years of testimony and evidence gathering. In my view, the veto of the modest used car rule (along with the vote for the Luken-Lee amendment last fall) marked the absolute nadir of the consumer consciousness in the Congress. Most signs point to a strong turn in the right direction—in Congress if not in the current administration—but legislative veto is an unfortunate hangover that should be discarded.

[The following information was subsequently received for the record:]

QUESTIONS OF THE MAJORITY AND THE ANSWERS THERETO

Please describe any ideas you may have for statutorily expanding the authority of the Commission or improving Commission procedures or remedies so that the Commission may be more effective in protecting consumers.

See my letter of April 6, 1983, p. 46.

QUESTIONS OF THE MINORITY AND THE ANSWERS THERETO

Question. If deception were defined to include some "notion of materiality" as well as a reasonableness standard, what practical effects would that have on Commission enforcement of deceptive advertising cases?

Answer. The caselaw already requires a determination that a deceptive representation is "material." Generally, the Commission is able to reach such a conclusion based on common sense alone, although relevant evidence is permitted to be introduced into the record. The only likely practical effect of the addition of a statutory requirement is a conclusion by the courts that Congress had decided that the caselaw set too low a standard. Thus, Congressional action might be interpreted as a desire to require the Commission to have objective evidence, such as surveys, of materiality.

This result would be unfortunate because the Commission would then be required to spend time and money obtaining evidence on an issue that is rarely worthy of debate. If a company is willing to spend money to make a particular claim, it is likely that the company believes the claim is material to consumers. Generally, I would expect the company's judgment on that point to be correct.

In short, if the statutory change is intended merely to restate current law, it is unlikely to be helpful and risks unforeseen court interpretations.

Question. Although all the regional offices will remain open, do you believe that the reduced field operation will keep the agency viable?

Answer. Because the new regional office arrangement is untested, it is impossible to give a definite answer to this question. However, in view of the drastic personnel reductions in the regional offices that have been directed by Chairman Miller and approved by a majority of the Commission over my dissent, it is extremely doubtful whether the regional offices will be able to sustain—or come anywhere near—their previous record of excellence in law enforcement and service. It is well-established that the regional offices' law enforcement record has been second to none within the Commission; they have brought a disproportionate number of our cases over the past several years, including several major consumer redress actions. Thus, to the extent their performance declines as a result of a severe shortage of resources, it can be reasonably expected that the enforcement record of the agency as a whole will further decline as well.

Commission management and budget analyses indicate that a regional office needs at least 20 to 25 people to be cost-effective. Chairman Miller himself has acknowledged and accepted this finding in Congressional testimony on the Commission's regional offices. In the five-year period preceding the present FTC Administration, a period of impressive regional enforcement activity, our regional offices were operating at this desired level or higher. Under the present Administration, two of our ten regional offices have below 18 people (Denver with nine and Boston with 16) and the other eight will each have only 18 when the ongoing RIFs take effect on April 9.

These levels were established by our Senate Appropriations Subcommittee to be a "floor" for our regional offices, a device to be used if necessary to cope with any budget difficulties. In reality, they are being interpreted as "ceilings" by this Administration, which apparently intends to maintain these minimum levels as maximum levels at least through fiscal year 1984, even if our budget is sufficient to support larger regional offices approximating the 20–25 person level. These reductions are having a crippling effect at least on the hardest-hit offices. Denver, once one of our finest law enforcement units and now the smallest regional office with only 9 people, has been drastically limited in its capacity to handle meaningful enforcement responsibilities. New York and Chicago, previously our two largest offices, have lost 54 percent and 47 percent of their staffs, respectively, just in the past month. As one might expect, this has damaged the morale—not to mention the cases—in these offices.

On an aggregate level, the present Administration has shrunk the regional office workforce from 382 to 169 workyears, a cut of 56 percent, in just two weeks. Given an overall personnel reduction of this magnitude, and the crippling impact of it on several individual offices, it is naive and misleading for anyone—even those who are sincerely committed to making the new regional office structure work—to suggest that the enforcement capacity of our regional offices will not suffer enormously. It already has.

The present Administration came into office promising less aggressive enforcement, which would necessarily mean less regional office enforcement. Through these drastic regional office reductions, its promises are becoming a self-fulfilling prophecy. Unfortunately, it seems that only Congress, by providing the Commission with sufficient funds for regional office restaffing and directing the Commission to reinstate its prior policy of strong regional enforcement, is in a position to reverse, or at least restrain, the anti-enforcement course of this Administration.

Question. Please give the Committee your views on the proposed funeral rule.

Answer. I strongly support the FTC's funeral rule. As amended to be consistent with the guidelines Congress set down in the 1980 Improvements Act, the rule establishes minimum standards of fair dealing to protect consumers in this uniquely painful, expensive, and unfamiliar purchase. The heart of the rule, requiring the pre-sale disclosure of itemized price information, will help ensure that consumers have the ability to choose the funeral goods and services that they want. And the greater availability of price information will help to stimulate price competition and keep prices down.

Question. Do you agree that the Supreme Court in *Dr. Miles* and subsequent cases established as the law of the land that resale price maintenance is per se illegal?

Answer. Yes. The Court has stated again in recent cases that resale price maintenance is per se illegal.[1] The Chairman has argued that the law is very complex on this point. In fact, it is quite clear tha the courts and the Commission are to apply a per se standard, i.e., when resale price-fixing is proved, it should be declared illegal without a need to perform a complex economic analysis of competitive effects. To insist that the Commission has the authority to apply its own "public interest" standard to avoid the Supreme Court's decisions is legally unsound and bad public policy.

Question. Do you agree that your enforcement of resale price maintenance has diminished substantially?

Answer. Yes. The Commission has issued three RPM orders since Chairman Miller arrived—two consent agreements and one litigated opinion and order. The two consents had been signed by the staff before Chairman Miller arrived and he voted against liability in the litigated matter. In contrast to this poor record, there were 24 final RPM orders during the fiscal year 1977–81 period.

Question. In your opinion, is there any justification whatsoever for a manufacturer setting and enforcing a minimum sales price for its goods?

Answer. The argued legitimate objectives for resale price maintenance, e.g., dealer provision of services, can be obtained through other means besides resale price-fixing, such as reasonable performance requirements by manufacturers. The most arguable situation for a manufacturer's requiring RPM is the case of a new entrant which may be able to acquire distributors only if the dealer can be assured a minimum price for a limited time. Even in this situation, territorial restrictions can probably accomplish the same objective in a less anticompetitive way. If, in fact, further research shows that RPM is procompetitive in any narrow situation, the law should carve out a clear exception to the per se rule for this situation only. Applying a rule of reason to all cases will reverse the presumption of illegality, encourage most manufacturers who want to do so to implement immediately an RPM scheme, and make permanent the current administration's absence of enforcement.

Question. Should injury to business competitors or injury to the marketplace by a deceptive ad be examined by the FTC?

Answer. The injury to consumers from some deceptive practices may be relatively small or short-lived. However, such practices can be very damaging to honest competitors and to the business community as a whole, because they divert customers from legitimate businesses and undermine the consumer's belief in a marketplace that adheres to certain principles of honesty and fair-dealing. I take strong exception ot the Chairman's assertion that the Commission should not have an independent interest in these effects. Indeed, I think the business community looks to the Commission to maintain a certain modicum of civilization in the marketplace and strongly supports its efforts in this regard. Consequently, the Commission should not automatically decide against issuing a complaint merely because a deceptive practice has caused relatively little injury to the individual consumers affected or if the injury to individuals cannot be proven.

Question. What effect will defining "deception" have on the ad substantiation program if the current restrictions on "unfairness" jurisdiction over commercial advertising are continued?

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[1] See *Rice* v. *Norman Williams Co.*, 50 U.S.L.W. 5052, 5053 (U.S. July 1, 1982); *Arizona* v. *Maricopa County Medical Society,* 50 U.S.L.W. 4687 (U.S. June 18, 1982); *California Retail Liquor Dealers* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 102-103 (1980). While the Supreme Court has recently granted certiorari in a case in which the Justice Department has filed an amicus brief urging reversal of the per se rule, this issue is not a principal one before the Court and the Court need not reach it to decide the case.

Answer. The current restriction on the unfairness jurisdiction over commercial advertising effectively terminated the children's advertising proceeding and prohibits new rulemaking initiatives concerning commercial advertising which are based on the unfairness authority. Continuing these restrictions would make including a Commission ad substantiation requirement in any new rulemaking proceeding extremely difficult, if not impossible. In establishing the advertiser's duty to substantiate claims in the *Pfizer* case, the Commission relied on an unfairness theory under Section 5. The Commission held that, because an advertiser could easily determine and know the facts underlying a particular claim, and the consumer usually could not, the advertiser had a duty, under principles of Section 5 marketplace fairness, to substantiate its product claims. Since *Pfizer,* a secondary theory of ad substantiation, based on deception, also has been utilized. Under this theory, a failure to substantiate is deceptive where an ad falsely implies the existence of substantiation.

Should commercial advertising not be subject to the Commission's unfairness jurisdiction for purposes of rulemaking or case by case adjudication, the Commission would be forced to prove that the lack of substantiation is deceptive within the meaning of Section 5. While this can easily be done in certain situations, e.g., when the ad refers to testing, it is more difficult when there are no direct references to testing in claims about the product.

The problems in proving ad substantiation cases will be substantially more difficult, however, if deception is defined as proposed by Chairman Miller and the advertising industry. It would be necessary under their proposals to prove that a false claim of prior substantiation caused substantial injury to consumers acting reasonably. That is, the Commission would have to develop reliable evidence—possibly through costly tests and surveys—showing that consumers believed, because of the ad, that a claim was substantiated and relied on that belief in making their decision to purchase the advertised product, leading to injury because the product did not live up the claim. Since a consumer purchasing decision is a highly complex phenomenon, usually based on a variety of factors and sources of information, proving that the false claim of substantiation for a particular claim was the proximate cause of a consumer's purchase and resulting injury is practically impossible. Under their injury-based deception proposals, the Commission's ad substantiation requirement could become virtually non-enforceable.

Question. In your opinion, would setting standards concerning deceptive practices minimize uncertainty?

Answer. Statutory standards would do little to increase the certainty as to what deceptive practices cases will be brought by the Commission. While the Chairman thinks that his proposal would achieve this result, the individual philosophies of Commissioners and the Commission's budget would continue to play major roles in determining what cases the Commission brought, even with the Chairman's proposed changes. (It is clear, however, that fewer cases would be brought overall under the Chairman's proposal, since each case would be more expensive to litigate.)

Nor does the proposal increase certainty about the outcome of particular cases. Take, for example, the "reasonable consumer" standard that the Chairman would incorporate into the statute. The Chairman has never proposed an objective method for determining what are reasonable interpretations of an advertisement. He has said that we shouldn't be concerned about "claims misunderstood at most by only a small minority;" [2] however, he has not suggested a particular percentage of consumers who must interpret an ad in a certain way in order for that interpretation to be considered "reasonable." Consequently, although survey evidence would be considered necessary in more cases litigated under his standard, the evidence would still have to be evaluated and interpreted by Commissioners, who could reach different conclusions based on the data. Similarly, the injury standard for the Chairman's proposal has been restated several times, but I seriously doubt that many people—least of all business persons who must comply—could restate what is substantial injury under his proposal.

Question. How would defining "deception" affect the FTC's authority over statements which are deceptive by omission?

Answer. It is not entirely clear what effect defining deception would have on the Commission's authority over statements which are deceptive by omission. However, the Chairman's language would at minimum pose the same difficulties for these kinds of cases as they would for other deceptive advertising cases. That is, the Commission would have to prove that "reasonable" consumers relied on affirmative product claims that were deceptive for failure to include a highly material fact, and that such reliance was a direct cause of substantial consumer injury. The Commission's case would probably be harder to prove factually, since it would be necessary to show that information *not known* to consumers was a proximate cause of their injury.

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[2] Prepared Statement before the Consumer Subcommittee, July 22, 1982, p. 7.

Question. What effect would Chairman Miller's proposal have on deceptive practices (other than advertising) challenged by the Commission?

Answer. Very little attention has been given to the effect the Chairman's proposal would have on cases that do not concern advertising. It's important to ask what that effect would be, since only a fraction of our consumer protection budget is devoted to advertising. But I'm not sure I have the answer.

At minimum, the proposed statutory language would have the discomforting effect of requiring the Commission to force every case into "a misrepresentation" model.[3] Thus even the most straightforward fraud case, such as one concerning the sale of a nonfunctioning product, would require an elaborate pleading that the seller misrepresented (perhaps only implicitly) that the product would work.

A more serious effect would be the need to prove consumer *reliance* on a seller's misrepresentations and a direct connection between the misrepresentations and injury to consumers. The Chairman has said: "To determine if consumer injury is likely, the key question is whether consumers have given up something of value *by their reliance* on the misleading claim."[4] (emphasis added) As I noted in response to Question 6, it is extremely difficult to prove that consumers relied on particular false claims or promises in purchasing products. The factual case becomes even harder when, unlike the advertising case, the Commission must deal with oral misrepresentations that varied from consumer to consumer.

Question. Would you oppose an extension (for the life of the authorization) of the 1980 Acts' agricultural cooperative provision?

Answer. Even though the limitation on the Commission's ability to study marketing orders is unwarranted, the current provision does not impose a substantial limitation on legitimate Commission activity and is far preferable to the provision in last year's Senate bill, S. 2499. Consequently, I do not strongly object to the current provision for the life of the authorization, particularly when viewed as an alternative to the virtually complete exemption for agricultural cooperatives in S. 2499.

Question. Would you object to a permanent provision for a legislative veto?

Answer. Yes. As I indicated in my testimony to the Committee legislative veto is a flawed oversight device that has not worked in the public interest and should not be extended.

Question. Do you believe the FTC has systematically misapplied the deception doctrine?

Answer. I don't think anyone has seriously argued that the Commission has systematically misapplied the deception doctrine. What the Chairman has done is point to a handful of cases that he thinks shouldn't have been brought, either because the consumer injury was not sufficient to justify Commission action, or because the Commission adopted an unreasonable interpretation of an ad. I agree with him on some of the cases, particularly as to certain old cases which seemed to be a misallocation of resources pursuing minor deception by small companies, and disagree with others. But where we totally part company is with his conclusion that there is a problem with Section 5 and that the statute can be improved by adopting his definition.

There have, undoubtedly, been a few bad judgment calls by the Commission. However, Congress cannot legislate good judgment. The Chairman's proposal would not eliminate the bringing of bad cases by the Commission; it would simply make it more difficult for us to win good cases.

QUESTIONS OF SENATOR LAUTENBERG AND THE ANSWERS THERETO.

Question. Would the members of the Commission, individually or jointly, set forth publicly, and in clear detail, the standards it intends to apply in determining whether, in a given case, it is in the public interest to enforce the law prohibiting resale price maintenance?

Answer. There are clearly some resale price maintenance cases which would be more desirable for the Commission to bring than others. For example, other things equal, it would be preferable for the Commission to use its limited resources to challenge widespread RPM policies by a nationwide manufacturer than to sue a small local one. On the other hand, it is not appropriate for the Commission to substitute its judgment that a rule of reason standard is appropriate for the decisions of the Supreme Court requiring a per se standard. The argument that Congress intended the "public interest" language in Section 5 to give the Commission this discretion is legally unsound and, if carried to its logical conclusion, would mean that the Commission could substitute its judgment on any issue for the Supreme Court's.

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[3] I am using for reference the language proposed on p. 4 of the Chairman's July 22, 1978, prepared statement.

[4] Prepared statement at 30.

Chairman Miller has argued that resale price maintenance is harmful only if it leads to collusion at the maufacturer or dealer level. While I agree that these situations are harmful, I do not agree that they are the only cases where harm to competition occurs. Moreover, the evidentiary difficulties in proving collusion or the promotion of interdependent pricing are formidable (and I suspect Chairman Miller would require even more proof than I would on these points). Consequently, a policy that the FTC would only pursue RPM cases where collusion is shown is likely to result in few if any RPM cases. I fact, that is precisely the record of this administration. The only RPM orders issued since October, 1981 resulted from cases which were essentially completed when Chairman Miller arrived.

An excellent example of the refusal to enforce the law governing RPM is a consent agreement currently pending at the Commission, which has not been acted upon for almost two years, as indicated in response to Senator Ford's question at the March 16 hearing. The agreement was signed by the staff and the respondent in July 1981. Unfortunately, by the time the staff forwarded the consent agreement for Bureau review, a new Chairman and Bureau Director arrived. As a result, the agreement was sent back and forth between the Bureau and the staff for a year. It was forwarded to the Commission in September 1982 and has been awaiting Commission action since then. A refusal to act on this executed agreement—not on the basis that resale price maintenance has not occurred, but on the basis of a different economic standard than the Supreme Court has set down—is a refusal to enforce the law.

I assume the figures requested in this question will be forwarded by the Chairman.

Federal Trade Commission,
Office of the Commissioner,
Washington, D.C. April 6, 1983.

Hon. Bob Packwood,
Chairman, Committee on Commerce, Science, and Transportation,
U.S. Senate, Washington, D.C.

Dear Senator Packwood: I appreciate the opportunity to respond to your request for a positive legislative agenda to strengthen the FTC. As I indicated at the hearing on March 16, it was a similar invitation in 1969 by the Senate Commerce Committee which led eventually to the passage of much of the consumer legislation of the 1970's.

There are six areas in which I believe new legislation could accomplish a great deal. In some, the FTC has had a record of achievement which needs to be continued and strengthened. In others, previous statutory amendments to the FTC have left some unanticipated "gaps" which suggest statutory changes. I have included as an appendix possible statutory language for each recommendation.

NEW AUTOMOBILE DEFECTS AND WARRANTY PERFORMANCE

The Commission during the late 70's pursued cases against automobile manufacturers for refusing to disclose known defects in new vehicles. In 1978, the Commission issued a consent order in *Ford*, Docket No. 9105, which required Ford to reimburse consumers for a piston design defect caused by inadequate lubrication. In addition, the Commission order required Ford to provide information to future buyers concerning other major mechanical defects in Ford vehicles that were discovered through its internal quality control system. Since then, the Commission has issued orders requiring disclosure of major defects in new cars sold by American Honda, Volkswagen, and Chrysler. In some of these cases, in addition to ordering disclossure of product information, the Commission required the payment of redress to purchasers who had incurred significant repair and replacement costs as a result of the undisclosed defect. Presently, the Commission is considering a possible settlement of a complaint filed against General Motors in 1980 for allegedly failing to disclose known major defects in the transmission, camshaft and diesel fuel performance of millions of GM cars.

Notwithstanding this record of past accomplishments, no new auto defects cases have been brought during the present FTC Administration. In order to insure that the FTC stays active in this important area, and to make clear the duties of auto manufacturers under Section 5, I propose an amendment which would direct the Commission to initiate a rulemaking proceeding concerning defects in new automobiles. This amendment would recognize the economic importance of auto purchases to all consumers. For many individuals, the purchase of an automobile is the first or second most expensive purchase they will ever make. It can be among the most rewarding, but as the FTC cases illustrate, it can also be among the most aggravating when the vehicle suddenly and prematurely breaks down at great expense to the owner. Damages can run into the thousands of dollars, and sometimes require replacement of the vehicle. If they occur following the expiration of the owner's warranty, or if the manufacturer fails to perform its warranty obligations promptly and adequately the individual consumer can suffer substantial out-of-pocket loss and may be effectively denied recovery due to the high costs of taking private legal action. In addition, consumers are often frustrated by the time and inconvenience required for dealers to perform warranty service, and in fact frequently complain that their new vehicle is never restored to a new car condition even after repeated trips to the dealer. Consequently, in addition to standards for disclosure of auto defects, the Commission should consider a rule concerning performance of new car warranties. While Congress has previously considered "lemon law" legislation which included provisions for warranty performance, a Commission rulemaking proceeding would have the advantage of providing an opportunity for all interested parties to furnish information for the rulemaking record and for consideration of a variety of possible approaches.

In summary, given the industrywide scope of these problems and the need to harmonize standards of conduct in the Commission's various individual orders pertaining to auto defect disclosures, it is now appropriate for the Commission to initiate an industrywide rulemaking proceeding to establish uniform obligations of manufacturers in this area under Section 5 of the FTC Act. In such a proceeding, the Commission would examine the records of its auto defect investigations to date and other relevant sources of information, invite extensive written and oral public comment, and determine on the basis of its findings whether to promulgate a uniform set of defect disclosure and warranty performance standards, applicable to all auto manufacturers, in the form of a trade regulation rule.

CLARIFICATION OF THE COMMISSION'S INJUNCTION AUTHORITY

The Commission's authority under section 13(b) of the FTC Act, 15 U.S.C. § 53(b), to seek preliminary and permanent injunctions in federal district court was created in 1973 by Section 408(f) of the Trans-Alaska Pipeline Authorization Act, Public Law No. 93-153. Because the legislative history of this provision, which was added by Senator Jackson as a floor amendment, is very limited, questions of interpretation have created enforcement problems for the Commission.

One question is whether a district court is limited in a preliminary injunction action brought by the Commission to ordering only the cessation of an illegal act or practice. Overruling a district court decision adopting a narrow interpretation of its authority, the U.S. Court of Appeals for the Fifth Circuit ruled last year that all of the inherent equitable powers of a district court are available to it in a preliminary injunction action under Section 13(b). In particular, the court found that a district court may order ancillary relief that is "reasonably necessary" to prevent the dissipation of assets that may constitute part of the relief eventually ordered in a consumer redress action under Section 19 of the FTC Act. *FTC* v. *Southwest Sunsites, Inc.*, 665 F. 2d 711 (5th Cir. 1982), cert. denied, 102 S.Ct 2236 (1982). This decision was very important to the Commission, because a company's assets may be totally depleted by its executives and stockholders during the lengthy administrative proceeding that preceeds a Section 19 action, if the Commission is powerless to restrain the disposition of those assets. In a somewhat analogous decision in the antitrust area, the the Court of Appeals for the District of Columbia Circuit held in 1981 that in the case of a challenged merger, a district court may issue a hold separate order under its inherent equitable powers. *FTC* v. *Weyerhaeuser Co.*, 665 F.2d 1072 (D.C. Cir. 1981). I propose that Congress spare the Commission further litigation on this issue and clarify the language of Section 13(b), consistent with the existing caselaw, to make clear that courts have broad powers in granting ancillary relief under 13(b).

A second major uncertainty that has inhibited enforcement actions under Section 13(b) is what constitutes a "proper case" for a permanent injunction. The Conference Report on the Pipeline Act does not even mention permanent injunctions. The

Senate Report on S. 356, from which Senator Jackson's provision was derived, contains only the following explanation:

"Provision is also made in section 210 for the Commission to seek and, after a hearing, for a court to grant a permanent injunction. This will allow the Commission to seek a permanent injunction when a court is reluctant to grant a temporary injunction because it cannot be assured of a early hearing on the merits.

"Since a permanent injunction could only be granted after such a hearing, this will assure the court of the ability to set a definite hearing date. Furthermore, the Commission will have the ability, in the routine fraud case, to merely seek permanent injunction in those situations in which it does not desire to further expand upon the prohibitions of the Federal Trade Commission Act through the issuance of a cease-and-desist order. Commission resources will be better utilized, and cases can be disposed of more efficiently." Senate Rept. 93-151 (93d Congress, 1st session 31 (1973)).

To date, the Commission has limited itself to seeking permanent injunctions in a handful of "routine fraud cases," the only example of a "proper case" contained in the Senate Report discussion. However, the Commission's efforts to seek immediate, permanent relief in district courts for clear violation of Section 5 should not be so restricted. Deceptive advertising cases, for example, could also fit within Congress' intent to provide efficient relief in situations in which the Commission "does not desire to further expand upon the prohibitions of the Federal Trade Commission Act."

I urge the Congress to encourage wider use of the efficient permanent injunction mechanism by replacing the current language of 13(b) with a new Section 13(c) that identifies the proper cases for permanent relief as those where the Commission determines, in its discretion, that further development of the law in a Section 5 administrative proceeding is unnecessary to establish that a law violation has occurred. In application, this would mean that whenever the Commission concludes that the meaning of the law is sufficiently clear that liability can readily be determined in a district court proceeding, a permanent injunction can be sought.

My proposed language for a new Section 13(c) would also remedy several other problems that have arisen in interpreting Section 13(b). First, it would make it absolutely clear, consistent with the plain language of the current provision, that permanent injunctions may be sought in antitrust as well as consumer protection cases. Because S. 356 limited the Commission's authority to seek injunctions to consumer protection cases, all the legislative history on the Commission's permanent injunction authority (quoted above) pertains to consumer protection actions. As a result, the Commission has declined to date to seek permanent injunctions in unfair methods of competition cases, despite the fact that 13(b) as actually passed does not contain the limiting language from S. 356. It is my feeling that many antitrust cases, for example, an ongoing price-fixing scheme, are appropriate candidates for permanent injunctions. If the Commission's authority to act is made more explicit, that showing of Congressional intent will compel the Commission to give more consideration to possible use of that authority in the future.

The proposed new Section 13(c) would also expressly establish that the district court hearing a permanent injunction case has the authority to order a broad range of preliminary and permanent relief in such actions, including divestiture in antitrust cases and, in particular, consumer redress in deception cases. This would be consistent with current caselaw. In *FTC* v. *H.N. Singer, Inc.*, 688 F.2d 1107 (9th Cir. 1982), the court of appeals upheld the district court's preliminary injunction freezing assets, finding that the court had the authority ultimately to grant the rescission of consumer contracts. In another case, a district court ordered a manufacturer and distributor of mobile homes to notify past purchasers that their warranty rights might be greater than those stated in their written warranties. *FTC* v. *Virginia Homes Mfg. Corp.*, 509 F. Supp. 51 (D. Md. 1981), aff'd No. 81-1187 (4th Cir. July 14, 1981) (unpublished).

The two-stage procedure for obtaining consumer redress under Section 19(b) of the FTC Act has proven thus far to be extremely cumbersome. It is likely that in many future cases the Commission will want to forego an administrative proceeding and proceed immediately to district court for a determination of liability and consideration of all requests for preliminary and permanent relief by one judge. The proposal would facilitate such actions by codifying the finding in *Singer* that redress may be sought under Section 13 as well as Section 19.

Finally, by establishing a separate subsection pertaining to permanent injunction suits, the proposal would resolve the question (which was briefed but found unnecessary to decide in the *Virginia Homes* case) as to whether permanent injunctions can be sought only in those situations that also satisfy the conditions for preliminary injunctions. Preliminary injunctions can be obtained only when there is a continuing violation, or when the Commission has reason to believe that a violation is about to occur. Under the proposed Section 13(c), a permanent injuction ordering, for example, consumer redress, could be sought even when the violation is discontinued.

Much to their credit, Chairman Miller and Tim Muris, the Director of the Bureau of Consumer Protection, have recognized the potential of 13(b) and encouraged more aggressive use of the Commission's authority under that section. Clarification of the current statutory language would encourage the Commission to make better use of the remedies available to it under that section and would prevent additional litigation as to exactly what those remedies are and when they are available.

ALCOHOL ADVERTISING

The excessive, physically debilitating consumption of alcoholic beverages, particularly by young persons, is a major public health hazard in the United States. The all too familiar consequences of this problem—e.g., countless highway deaths caused by alcohol abuse, adult alcoholism and teenage alcoholism, birth defects—take a severe toll of human life and social welfare. Public concern about drunken teenage driving and teenage alcoholism in particular has become so great that it has spawned a genuine national grass-roots movement of parents, educators, clergy and the classmates of victims determined to call public attention to these problems and to get effective public action to deal with them.

To date public concern about young people in this area has focused primarily on the social and health effects of heavy alcoholic consumption, and has largely ignored a parallel phenomenon of growing significance, namely, the exponential growth in recent years in the commercial advertising and promotion of alcoholic beverages, especially televised advertising of beer and wine.

Under Congressional prodding, the FTC in the mid-70's undertook to determine whether any aspects of the increasingly pervasive and sophisticated advertising of alcoholic beverages might be having harmful effects on consumers. The Commission staff was directed to investigate in particular whether alcoholic beverage advertising might have the purpose or effect of appealing to heavy drinkers who, according to the National Institute on Alcohol Abuse and Alcoholism, make up 11% of the adult population. Congress was also interested in our studying whether any alcoholic beverage advertising was aimed at adolescents and designed to stimulate their consumption of alcoholic beverages. We reasoned that alcoholic beverage advertising directed at or appreciably affecting heavy drinkers or young persons could exploit the special vulnerabilities of these individuals and contribute to substantial consumer harm.

Based on the advertising campaigns and marketing studies of a few major alcoholic beverage producers, the Commission's staff determined there was a strong possibility that advertising was being designed to appeal to actual or potential alcohol abusers. Furthermore, information from other industry and academic research sources indicated the existence of similar questionable advertising and promotional practices throughout the industry. Nevertheless, Consumer Protection Director Muris recommended last year that the alcoholic advertising investigation be closed. Resorting to Catch-22 logic, the staff closing memorandum reasoned that since these questionable promotional practices appeared to be pervasive in the industry, it would be unfair to proceed only against the individual companies that had been investigated, and therefore no action of any kind should be taken by the Commission. In opposing the closing, I urged the Commission to conclude that the evidence warranted more investigation of these advertising practices in the alcoholic beverage industry, not less. Unfortunately, a majority of the Commission voted in favor of closing the investigation.

Chairman Miller also indicated in a letter to Congressman Florio (attached) that the Commission had obtained information beginning in 1976 concerning the effect of advertising on alcohol consumption:

"Various staff activities were undertaken [after March 1976]. Generally these involved the gathering of available information concerning the extent and nature of (1) injury caused by alcohol abuse and alcoholism; and (2) consumer knowledge of alcohol-related information, including, for example, the functional impairment resulting from alcohol use, the efficacy of various commonly accepted methods of 'sobering-up' and the relative alcohol content of liquor, beer and wine. The data gathered suggested that some consumers, especially teenagers, are unaware of these basic alcohol facts that would enable them to make rational and responsible drinking decisions."

Although he concludes that it would not be appropriate to pursue additional investigation, I believe the evidence collected so far points strongly to the opposite conclusion.

To my knowledge, neither the Commission nor any other responsible federal agency is seriously studying, much less moving against, advertising practices in the alcoholic beverage industry which may be having the deliberate or practical effect of encouraging consumption by heavy or young drinkers. This failure of action has been exacerbated by recent ruptures in the self-regulatory apparatus of the advertising industry, including the indefinite suspension of the National Association of Broadcasters Advertising Code, which contained specific restrictions and standards relating to alcoholic beverage advertising.

It would, therefore, be entirely appropriate for the Congress to direct the Commission to conduct an industrywide investigation of current alcoholic beverage advertising practices in order to determine the extent to which they may be encouraging the consumption of alcohol by highly vulnerable groups, particularly young and heavy drinkers. At the conclusion of the study, the Commission would be directed to transmit to Congress a comprehensive report of its findings and any recommendations for industry, legislative or regulatory action.

NURSING HOMES

No consumer is more vulnerable to fraud and abuse than the resident of a nursing home. Often without resources or family, ill and no longer able to live independently, the elderly individual is forced to spend his or her remaining days in a relationship of total dependency on an unfamiliar institution whose purpose is not only to provide care, but to make money. This situation inherently creates an enormous disparity of bargaining power between the nursing home consumer and proprietor.

Horror stories of abuses in nursing home care became almost legend in the 1970s. Whether or not they hold true today, in view of some reform efforts, is uncertain. Whatever the case, such stories, as tragic as they may be, are rightfully the responsibility of state and federal health authorities, not the Federal Trade Commission. The Commission does have an important role to play, however, in promoting fair dealing by balancing the inherently unequal business relationship between the resident and the home.

It is for this reason that the Commission began to take an active look in the late 1970's at some of the most troublesome aspects of the business side of nursing home operations that affected the bargaining power of the nursing home consumer, both in shopping for nursing home services and in protecting the resident's consumer rights inside the home. Our staff examined a variety of suspect business practices, including arguably unfair disclaimers or waivers of the home's legal responsibility for the health, safety and property of the resident; collection and patient deposit account clauses, and other one-sided contract provisions; abusive billing policies, including hidden and price overcharges; inadequate protections against sudden termination or transfer from the home; unfair restrictions on visitors' access to residents; requirements that residents purchase their pharmaceuticals and other needs only from suppliers approved by the nursing home; and false or misleading representations in the promotion of nursing home services and facilities to prospective residents.

The staff's investigation, which was essentially completed by early 1981, indicated that many of these business practices were occurring and appeared to be a serious problem in the nursing home industry. Nevertheless, since that time, the Commission has never taken or even considered taking any action in the nursing home area.[1] In the meantime, the evidence from our staff's investigation is now several years old and may conceivably be too incomplete and too dated to provide a reliable picture of current business practices in this industry. Apparently believing that the Commission's data base is too weak and too old to support Commission action of any kind, or even to warrant further investgation to get more current information,

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[1] On the basis of this investigation, the Commission did file comments in 1980 on a Department of Health and Human Services proposal for a "Patients Rights" section to be added to the Conditions of Participation by nursing homes in Medicaid reimbursement programs. As you may recall, however, those proposed revisions, which were intended to establish and strengthen the consumer rights of nursing home residents, were subsequently rescinded by the Reagan Administration.

The Commission is presently considering, independent of its nursing home investigation, a proposed consent agreement with a "life care" facility. Part of a new-growth industry, life care homes, unlike nursing homes, only accept elderly individuals who are still independent and healthy.

Bureau Director Muris has recommended to the Commission that our entire nursing home investigation be closed.

While the Commission may not have the best available information of current nursing home business practices as a result of its recent inactivity in this area, new evidence has come to light from an independent source indicating a continuing pattern of consumer abuses in our nation's nursing homes. I am referring to the two-month old report by the Staff of the Senate Special Committee on Aging entitled, "Consumer Frauds and Elderly Persons: A Growing Problem." Based on a recent nationwide survey of district attorneys, attorneys general, chiefs of police and state consumer affairs offices, the report finds that consumer and economic frauds directed at the elderly are pervasive and growing, and names nursing home abuses as one of the ten most harmful frauds in the nation. The report states:

"Abuses in nursing homes have been well publicized during the last decade, largely due to the efforts of the committee. Most of the concern that has been generated has focused on the quality of care issues and indications of medicare and medicaid fraud. Because the Government, as the purchaser of services, is so evidently defrauded by these activities, we have often lost sight of the fact that the seniors are often also defrauded. They may be conned into paying an "admission fee" to purchase a place in a medicaid facility, overcharged for specific services, defrauded out of personal maintenance funds, and forced to pay for specific services and supplies that should be included in the home's per diem rate.

"One of the more recent variations on this theme is the development of 'lifecare' facilities. In these instances, seniors are persuaded to sign over all of their assets with the promise that they will be taken care of until they die. Often, the facility changes ownership or goes out of business, leaving the seniors stranded and exposed.

"Another recent example of nurisng home fraud is provided by the Iowa nursing home resident who was taken on a shopping spree by two female employees. While he was there, a clerk observed one of the employees take a credit card from the elderly man's pocket, make a purchase, and return it. The nursing home resident had no recollection of the event."

These reported frauds are remarkably similar to the kinds of questionable business practices that have been previously investigated by the Commission.

In view of this new survey evidence from local consumer protection authorities across the country, the Commission should be considering a positive plan of action for this area rather than a recommendation for shutting down its nursing home program. The Commission should determine through follow-up investigation of its staff's earlier findings, as well as those of the Senate Aging Committee, what it can do affirmatively to help eliminate abusive business practices in the nursing home industry. However, given the pending rrecommendation to terminate our nursing home project, and the lack of any sign that the present FTC Administration considers a strong Commission presence in the nursing home industry to be a high priority, I am not overly optimistic that internal proposals for positive action will be adopted. I would urge the Committee, if it agrees that the Senate Aging Committee's findings help establish a need for further investigation and action, to direct the Commission to exercise its statutory authority in this area by bringing cases, issuing reports, guidelines or policy statements, or taking any other appropriate action to deal with abusive business practices in this industry. To determine whether the Commission has carried out this mandate, it should be instructed by the Committee to transmit periodic reports of its activities in this area.

ELIMINATION OF NOTIFICATION REQUIREMENT IN SECTION 19 REDRESS CASE

Section 19(c)(2) provides that in any action in which the Commission seeks consumer redress for violation of a Commission rule, or for commission of an act or practice that a reasonable man would have known under the circumstances was dishonest or fraudulent, the court shall cause notice of the pendency of the action to be given to all persons, partnerships, and corporations allegedly injured by the deceptive practices. The legislative history sheds no light on the purpose of this provision. While doubtless well-intentioned, it serves no practical purpose and, as applied to date, poses a formidable barrier to the Commission's ability to utilize the provisions of Section 19 to protect consumers.

Section 19(c)(2) is apparently modeled after the notice requirements of Rule 23 of the Federal Rules of Civil Procedure, governing class actions. Notice in a Rule 23 class action, however, serves a purpose that is totally irrelevant to a Section 19 action. In a Rule 23 action, consumers must be notified of the pendency of a case so they may choose whether to opt in or out of the litigation, since their legal rights may be affected by the outcome. In a Section 19 action, however, the Commission does not sue as a class representative to enforce rights of individual consumers; it sues as a governmental agency to enforce a statutory provision that only it may enforce. Accordingly, contractual or other legal rights of injured consumers cannot be affected by redress actions, and there is no necessity to accord consumers a right to opt into or out of a redress action.

Obviously, where the Commission succeeds in gaining a judgment of consumer redress and collecting actual monies from the defendant with which redress may be paid, notice to injured parties may be needed to permit them to obtain their funds. Such notice, however, can be required by the court without specific authorization as part of the final judgment when the Commission has prevailed. Section 19(c)(2), unfortunately, requires that notice be given of the pendency of the action. In the only case to address the section so far, the court has construed this to mean that notice must be given during the action, before the assessment of damages and even before discovery of the defendant's assets. Consistent with the rule for class actions, the court has also ordered the Commission to give notice of the action, at its own expense, subject to recoupment of the costs as court costs from defendant. *FTC* v. *Glenn W. Turner*, No. 79-474 (M.D. Fla.).

While we believe the court's ruling is incorrect,[2] it is not an implausible construction of Section 19(c)(2). The effects of such a ruling, however, can be devastating. Often when it sues for redress, the Commission does not know in advance whether it will be able to recover any money should it prevail on the merits. It is pointless, and may actually be harmful, to give notice to consumers of the possibility of redress when that possibility may not be realistic. Moreover, it wastes funds—either those of the Commission or those of the defendant—to require such notice at a time when it serves no purpose. Indeed, faced with the necessity to give costly notice without any assurance that consumers will ever be repaid, or that the cost of notice will be repaid, the Commission may be forced to abandon redress cases where it lacks tangible evidence of recoverable assets. To eliminate this problem, I urge elimination of Section 19(c)(2), to be effective immediately as to all pending cases.

INSURANCE STUDIES

The McCarran-Ferguson Act (15 U.S.C. §§ 1011-1015) of 1945 designates the states as the regulators of the "business of insurance," with limited exceptions. However, until 1980, the Commission retained the authority to study insurance problems pursuant to its general authority under Section 6 of the FTC Act to gather information and investigate the businesses of companies affecting interstate commerce. Based on that authority, the FTC undertook a number of studies of insurance issues between 1972 and 1980, with the aim of assisting the states and reporting to Congress on various consumer protection and competition concerns. Investigations led to reports on life insurance cost disclosure, Medicare supplement insurance, and industrial insurance. These studies proved valuable to state legislators and regulators who have the primary responsibility for regulating insurance, and to the public generally which spends billions of dollars annually for various forms of insurance.

Despite the usefulness of these activities, insurance studies by the Commission were terminated with enactment of the FTC Improvements Act of 1980. This Act removed the FTC's Section 6 investigatory authority over insurance, unless a study or report is requested by a majority of the members of the Committee on Commerce, Science and Transportation of the Senate or the Committee on Interstate and Foreign Commerce of the House of Representatives.

This 1980 amendment should be repealed. It was enacted primarily in response to the Commission's life insurance cost disclosure study, which exposed the low rates of return for whole life policies and proposed a method by which the states could require a uniform disclosure concerning rates of return which consumers could use to compare policies. Since that time it has become even clearer that the investment value of insurance policies are extremely difficult for individual consumers to evaluate.

In the absence of a repeal of that amendment, however, there are a number of useful studies listed below which the Commission could conduct. Even though it is not clear that Congressional approval is required for the studies, because of the ambiguity of the 1980 provision, the Commission is effectively deterred from proceeding in these areas without Congressional clearance. Congrss could direct the FTC to determine within 60 days which insurance studies it believes it can most effectively pursue and to report its findings to the Commerce Committees of both houses. The Commission should be further directed to complete those studies it has determined to be feasible and useful, and then report the results of such studies to the Congress and the States.

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[2] Before the court we argued that the requirement to give notice of the "pendency" of an action could be read to allow notice after a judgment fund had been amassed. We also argued that the general rule requiring plaintiff to give notice in class actions, *Eisen* v. *Carlisle & Jacqueline*, 417 U.S. 156 (1974), is applicable only where there has been no adjudication of liability. In the *Turner* case, the court has adjudicated the defendant liable for redress, although no amount has been set or, of course, any money collected.

Possible studies include:

(1) *Analysis of New Life Insurance Products: Variable Life and Universal Life.* An FTC study might analyze new life insurance products such as variable life (where the savings portion of premiums is invested in common stocks) and universal life (a combination of term and whole life, where consumers can tailor the face amount of insurance and the premium structure to their changing needs). A particular issue it might examine, for example, is the effectiveness of the SEC-required disclosure of information on variable life.

(2) *Private Health Insurance to Supplement Medicare.* In light of the likelihood of fundamental changes in the Medicare program (such as proposed change to prospective reimbursement), there will undoubtedly be major changes in the Medicare supplement insurance market. An FTC study might analyze options for keeping the private market working efficiently, based in part on the experience of various states.

(3) *Consumer Information in the Purchase of Auto Insurance.* This study would explore the availability and usefulness of information furnished prior to consumers' purchase of auto insurance. It would assess whether consumers can comparison shop for auto insurance and how better information might be made available. It would also examine insurance practices in modifying or cancelling policies based on claim experience and other unilateral policy modifications by insurers. Finally, it would assess whether consumers have adequate notice of insurers' legal and contract rights at the time of the initial transaction and whether insurers' practices deter legitimate claims.

Sincerely,

MICHAEL PERTSCHUK,
Commissioner.

APPENDIX—POSSIBLE STATUTORY LANGUAGE

1. Auto defects

Section ——. The Federal Trade Commission Act is amended by adding a new Section —— as follows.

The Commission is directed to issue an advance notice of proposed rulemaking for the purpose of initiating a rulemaking proceeding, pursuant to Section 18 of the Federal Trade Commission Act, concerning unfair or deceptive practices in:

(1) Failing to inform purchasers of new vehicles of unreasonable or unexpected levels of design or production defects;

(2) Failing to inform purchasers of new vehicles of appropriate use and care information relating to design or production defects; and

(3) Warranty performance in repairing or replacing new vehicles during the warranty period.

2. Clarification of injunction authority

Section 13(b) of the FTC Act is amended by inserting after the word "bond" in the second sentence a period and then the following:

"In such an action, the court may exercise the full range of equitable authority, including the power to order such ancillary relief as may be reasonably necessary in order to preserve the possibility of complete and meaningful relief at the conclusion of litigation."

Section 13(b) is further amended by striking the language beginning "Provided, further", inserting a period, and substituting the following:

(c) If the Commission determines that further development of the law through the issuance of a complaint and the conduct of a proceeding under Section 5 is unnecessary to establish that a person, partnership, or corporation has engaged in an unfair method of competition or an unfair or deceptive act or practice in or affecting commerce, or has otherwise violated any provision of law enforced by the Federal Trade Commission, the Commission may seek, and after proper proof the court may issue, a permanent injunction. The court in such an action shall have the authority to order all preliminary and permanent relief as may be reasonably necessary to remedy fully the violation, including any relief as may be available in an action under Section 19(b). Any such suit shall be brought in the district in which such person, partnership, or corporation resides or transacts business."

Section 13(c) is amended by redesignating it as Section 13(d).

3. Alcohol advertising

The FTC is directed to conduct a study of advertising practices in the commercial promotion and sale of alcoholic beverages, including beer, wine and liquor, for the primary purpose of determining whether such advertising has or may have the purpose or effect of stimulating alcoholic consumption by children, adolescents, or persons who are considered to be heavy users of alcoholic beverages.

At a minimum the study shall review and assess:

(1) The prevalence and health effects of alcoholic consumption;

(2) The prevalence, trends, themes, and consumer impact of alcoholic beverage advertising;

(3) Consumer knowledge of the health effects of alcoholic consumption;

(4) The past role and activities of the FTC and other relevant governmental agencies concerning the methods and effects of alcoholic beverage advertising; and

(5) Appropriate public and private responses to any problems found to be associated with alcoholic beverage advertising that warrant remedial action.

In conducting the study, the FTC shall generate and collect data from all relevant sources, including the internal records of alcoholic beverage advertisers, and to the extent necessary for this purpose shall make full use of its powers of compulsory process under Sections 6 and 9 of the FTC Act. At the completion of the study, the Commission shall submit a report of its findings and any recommendations for industry, regulatory or legislative action to the Congress. Following transmittal of this report to the Congress, the Commission thereafter shall be required to transmit an annual report to the Congress no later than January 1 of each year concerning: (1) current patterns of alcohol consumption; (2) current practices, methods, and effects of alcoholic beverage advertising and promotion; and (3) such recommendations for legislation it may deem appropriate.

4. Nursing homes amendment

The FTC is directed to reopen and complete its investigation of various business practices associated with the sale of nursing home services, and to exercise its full authority under this Act to prevent such practices which are in violation of Section 5(a)(1) of this Act. The FTC is further directed to transmit a report not later than January 1, 1984 of its initiatives and activities under this provision to the Committee on Commerce, Science and Transportation of the Senate and to the Committee on Energy and Commerce of the House of Representatives.

5. Insurance studies

The FTC is directed to submit to the Senate Committee on Commerce, Science and Transportation and the House Committee on Energy and Commerce within 60 days of enactment of this provision a list of feasible insurance studies which can be completed within 18 months and which are likely to result in benefits to consumers, the states and the Congress. The Commission shall complete those studies deemed feasible after consultation with the Committees.

ATTACHMENT

FEDERAL TRADE COMMISSION,
OFFICE OF THE CHAIRMAN,
Washington, D.C., March 1, 1983.

Hon. JAMES J. FLORIO,
Chairman, Subcommittee on Commerce, Transportation and Tourism, Committee on Energy and Commerce, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: Thank you for your letter of inquiry regarding Commission activities in the area of broadcast advertising of liquor. The Commission's staff has in fact looked into industry practices in this area in the past, and I am happy to provide you with a description of the staff's findings as well as several documents.

Until about 1976, Commission activities in the area of alcohol advertising had been limited primarily to considerations of whether particular claims in specific advertisements were deceptive. By that time, however, Commission staff attention had focused on the possible effect of advertising and media images on alcohol abuse. At the March 1976 hearings of Senate Subcommittee on Alcoholism and Narcotics, Commission staff testified regarding the committee's concerns as to whether alcohol advertising had any of at least three effects: (1) encouraging drinking beyond the point of abuse; (2) appealing to the particular vulnerabilities of alcohol abusers in order to encourage the switching of brands; or (3) reducing the incentives of an abuser to control his consumption. Staff had concluded, through its review of ads and other related activities, that there was some reason to believe that some or all of these effects might have been occurring.

Various staff activities were undertaken thereafter. Generally these involved the gathering of available information concerning the extent and nature of (1) injury caused by alcohol abuse and alcoholism; and (2) consumer knowledge of alcohol-related information, including, for example, the functional impairment resulting from alcohol use, the efficacy of various commonly accepted methods of "sobering-up" and the relative alcohol content of liquor, beer and wine. The data gathered suggested that some consumers, especially teenagers, are unaware of these basic alcohol facts that would enable them to make rational and responsible drinking decisions.

Staff activity was also directed to determining the nature and extent of available evidence into the specific appeals advertisers were attempting and the perceptions actually conveyed to consumers by various advertisements. It was discovered that very little research in this area had been publicly reported.

In 1977, the Commission authorized the use of compulsory process to determine whether a major U.S. seller of beer and a major marketer of alcoholic beverages were engaged in unfair advertising practices. Subpoenas in the above matters were, however, never issued. Staff was able to pursue the investigation with the voluntary cooperation of industry members. Nevertheless, the investigations did not yield evidence warranting a recommendation that the Commission commence an enforcement action. Ultimately, the staff concluded it would be appropriate to wait until a more substantial body of facts and research was available before recommending Commission action. Therefore, the investigations were closed.

To obtain a general foundation of information on the industry, the staff participated in the development of a research project concerning the "Contents and Effects of Alcohol Advertising." The project was conducted by Charles Atkins and Martin Block of Michigan State University and was jointly funded, at a total cost of about $96,000, by the Commission, the National Highway Traffic Safety Administration of the Department of Transportation, the Bureau of Alcohol, Tobacco and Firearms of the Department of the Treasury and the National Institute for Alcohol Abuse and Alcoholism.[1] The FTC also furnished the contracting officer's technical representative (COTR), who reviewed and consulted on all technical aspects of the study for the sponsoring agencies.

The study's objective was principally exploratory: to develop a methodology appropriate for examining the effects of alcohol advertising on consumer perceptions and attitudes, especially the attitudes of young people. The results—in eight reports—were released in late 1981. Report 1, attached as Appendix A, is an overview and summary of the study's methodological critique of the study for the sponsoring agencies that discussed certain limitations concerning the findings. That critique is attached as Appendix B.

From the evidence gathered thus far, it would not seem to be appropriate for the Commission to pursue additional industrywide inquiries into liquor advertising. The Commission will continue its routine monitoring of advertising and pursue individual investigations and cases as appropriate.

Sincerely yours,

JAMES C. MILLER III, *Chairman.*

The CHAIRMAN. Pat Bailey.

Ms. BAILEY. I had settled back for a few minutes.

Are you sure, Mike?

Mr. PERTSCHUK. Yes.

Ms. BAILEY. Mr. Chairman, members of the committee, I, like my colleagues, consider it a pleasure to be here to discuss our reauthorization once again, although it does give me, as I am sure it does you, some sense of deja vue to visit these issues yet again.

I just want to mention three specific matters which have been covered by some others, too, and the rest will be in my written testimony submitted for the record.

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[1] The research project grew out of staff participation in the Prevention, Education and Information working group of the Interagency Committee on Federal Activities for Alcohol Abuse and Alcoholism.

First, the proposed exemption of State licensed professionals and their professional associations. I would only reiterate that the Commission remains united in its absolute opposition to this exemption and in its belief that continued FTC jurisdiction over the professionals and their associations is crucial to the important public interest of maintaining free and open competition in health care and other service industries.

I still believe that any definitions of the FTC's authority in this area is unnecessary. However, should the committee believe that some compromise should be contained in the reauthorization bill, as an alternative to a total exemption, then I would strongly urge that it take either the form of the amendment sponsored last year by Congressmen Dingell, Broyhill, Florio, and Lent, which narrowly lost in the House, or the amendment sponsored by Senator Rudman which decisively passed in the Senate.

The Broyhill amendment had two basic elements. First, it applied the State action doctrine to the Commission's antitrust jurisdiction. Second, it contained a flat prohibition on any exercise of the Commission's unfairness jurisdiction to invalidate State law concerning education, training, and experience requirements or the permissible tasks and duties of State-licensed professionals unless such laws prescribe business and commercial practices.

A carefully drafted amendment of this kind would permit the Commission to continue pursuing traditional law enforcement aimed at price-fixing, boycotts, and other forms of collusive conduct, as well as unfair, deceptive, and fraudulent trade practices by members of professional groups.

Second, there was an effort last year, as you know, to obtain an exemption for commercial advertising from the Commission's unfairness jurisdiction. I, too, am opposed to that and believe the definition of "unfairness"in the statute solves any arguable problems that may have existed. I do not believe that the public would be at all reassured by a congressional decision to grant this exemption. Instead, I believe the public perception would be that the Congress has decided to permit, unchallenged, advertising which may be unfair.

Third, I remain unalterably opposed to any and all proposals to redefine the FTC's jurisdiction over deceptive trade practices or unfair methods of competition.

Lastly, I will speak somewhat as my colleagues already have. It has become increasingly clear to me over the last few months that the repeated challenges which have been made to the Federal Trade Commission's jurisdiction and authority have taken their toll on our ability to carry out our statutory mandate effectively. I do not object at all to intense and repeated congressional oversight. I welcome that. That is not what I am talking about at all.

We need to be called to account repeatedly for what we are doing or failing to do, but this constant barrage of special interests seeking special treatment or status, whether by complete exemption or redefinition of statutes, must at some point come to rest, at least for a decent interval. Otherwise, I fear that the timidity occasioned by these circumstances plus further confusion and demoralization of our staff will accomplish more quickly and decisively a narrowing or cessation of our work than can be effected by any statutory changes designed for that purpose.

I know the committee does not want that to happen. I would just say that we need your help to put some of these areas of controversy behind us so we can get on with our business, and I hope we can move toward that goal in these hearings and during this legislative session.

[The statement follows:]

STATEMENT OF PATRICIA P. BAILEY, COMMISSIONER, FTC

Mr. Chairman and members of the committee, it is a pleasure to be here today, with my colleagues, to discuss the Federal Trade Commission's 1983 reauthorization. I am certain that many of us approach this day with a sense of deja vu; it was just about a year ago that you met to discuss a possible 1982 reauthorization for the Commission. As we are all too well aware, events intervened and the authorization process was not completed last year. Thus, we are faced now with the need to revisit some of the issues we addressed last year as the Congress begins again to consider the agency's progress and prospects for the future.

Last year, I commented that the reauthorization then contemplated followed hard on the heels of several fundamental reforms to the agency's operations which were part of its 1980 reauthorization legislation. We have now had an additional year of experience with those reforms, and more time to reflect on the continued demands of some elements of the business community, organized medicine and others that the Commission's statutory authority be further circumscribed. Despite the heated controversy surrounding such proposals, which ultimately resulted in a stalemate of the authorization process during the 97th Congress, I have little doubt that a good number of them will continue to be pressed during this legislative session.

I would like to offer an observation which I sincerely hope this committee will consider. It has become increasingly clear to me that these repeated challenges to the FTC's jurisdiction and authority have taken their toll on the agency's ability to carry out its statutory mandate effectively. I would never argue that the intense congressional scrutiny of the agency and its activities over the last several years was not warranted. After much controversy and repeated attempts by the Congress, an authorization bill was ultimately produced in 1980 incorporating many significant statutory reforms to guide the Commission's activities into the future. but no sooner was the ink dry on the 1980 Improvements Act than a new wave of efforts emerged to curtail even further and more significantly the agency's operations through wholesale exemptions and other restrictive amendments to its basic organic statute. Although I recognize that some will disagree, it seems to me that the most recent efforts have been made more out of a sense of opportune political timing than to address any egregious missteps or misconduct in the agency's law enforcement activities. We have reached the point, I believe, where the Commission's caution in the face of the potential jeopardy of seriously damaging legislative action has visibly restrained new law enforcement initiatives. This phenomenon is especially obvious in the health care area but it is hardly less true in others.

Let me be as clear as possible about what I am saying and what I am not: I do not object to intense and repeated congressional oversight. I welcome it. We need to be called regularly and repeatedly to account for what we are doing or failing to do in carrying out our congressionally directed duties. But this constant barrage of special interests seeking special treatment or status—whether by complete exemption or restrictive redefinition of statutes—must at some point come to rest, at least for a decent interval. Otherwise I fear that the timidity occasioned by these circumstances, plus further confusion and demoralization of our staff, will accomplish more quickly and decisively a narrowing or cessation of our work than can be affected by any statutory changes designed for that purpose. And so, because I earnestly believe that this is a critical time for the FTC, I urge the committee to resist these now outdated attempts to bring the Commission to its proverbial knees. We need your help to put some of these areas of controversy to rest so that we can get on with our business. I hope we can move toward that goal in these hearings and during this legislative session. I am certain, without question, that the Commission is prepared to cooperate in every way toward that end.

Last year, under the bipartisan leadership of Chairman Florio and Congressmen Broyhill and Lent, the House Subcommittee on Transportation and Tourism proposed, and the full House Energy and Commerce Committee approved, a moderate and balanced approach to all of the reauthorization issues and proposals that had been raised by the business community and others during long months of hearings and negotiations. While other members of the Commission and I may disagree about specific aspects of the bill the House subcommittee produced (H.R. 6995), it represented a good framework—and, in my view, a maximum set of provisions—for the agency's reauthorization.

That bill, wisely in my opinion, did not address the proposed special interest exemption of State-licensed professionals from the Commission's jurisdiction. Later, however, and again in the spirit of moderation and bipartisan compromise, Congressmen Dingell, Broyhill, Florio, and Lent attempted to obtain a resolution of that difficult issue on the House floor. The failure of their proposed compromise was a bitter disappointment to the Commission. Fortunately, Senator Rudman's parallel efforts to ensure a more reasonable approach to this issue in the Senate Appropriations Committee—which were assisted and supported by a bipartisan group of other Senators including the distinguished chairman of this committee—were more successful. As you know, the conference committee on the continuing resolution ultimately determined not to address the Commission's jurisdiction over State-licensed professionals, preferring to leave resolution of this controversy to the House and Senate authorizing Committees. I sincerely hope that all of the legislators who attempted to settle this matter in a constructive, moderate manner during the last session, will continue to do so and ultimately prevail in their efforts this year.

As to the specific issues, including the professions, which will be addressed in this renewed authorization process, I expressed my views at some length last year and will only summarize them today. I would request, Mr. Chairman, that my testimony before the House Subcommittee on Transportation and Tourism last April 1, 1982, be incorporated into the record of this hearing, as well as my testimony before this committee's Subcommittee on the Consumer concerning proposals to narrow the agency's jurisdiction over deceptive trade practices at hearings held on that subject last July 22, 1982.[1] Beyond reviewing that testimony briefly, I will address some of the new proposals which have surfaced concerning possible compromises with respect to the Commission's jurisdiction over state-licensed professionals, including the compromise amendment which was proposed by the leadership of the Commission's authorizing committee on the House floor last December.

Proposals to circumscribe the Commission's authority fall into three basic categories: special interest exemptions for specific industry groups; attempts to narrow the agency's authority over deceptive trade practices and unfair methods of competition; and proposals to cut back on the law enforcement remedies available to prevent such practices.

SPECIAL INTEREST EXEMPTIONS

Perhaps the most significant causes of the controversy which has engulfed the Commission in recent years are repeated efforts by special interest groups to gain exemptions from the antitrust and consumer protection laws. Following immediately after an exemption of the insurance industry enacted in 1980, first State-licensed professionals and then the advertising industry have sought additional exemptions from all or some of the FTC Act's prohibitions on unfair or deceptive trade practices and unfair methods of competition.

Although I will devote the bulk of my testimony today to the profession issue, I will address briefly the exemption, proposed last year, for commercial advertising from the Commission's unfairness jurisdiction.

Those recommending the exemption contend, essentially, that the Commission's unfairness grants the FTC a virtual license to roam throughout the business community, imposing social judgments and its own conclusions concerning matters of taste on companies which are merely trying honestly to market their products. It is hardly a secret that the Commission's attempt to use unfairness authority to consider possible remedies for high pressure TV advertising aimed at children sparked calls for the abolition of this authority. I acknowledge, with regret, that that proposed rule was a political diaster for the agency. It is not, however, a justification for a special interest exemption for all commercial advertising from a fairness standard. Indeed, I find it puzzling that the advertisers—who dealt so effectively and conclusively with the Children's Advertising proceeding—assert that only an exemption will address an alleged problem that was definitely resolved a number of years ago.

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[1] The testimony referred to has been retained in the committee files. Commissioner Bailey's statement on deception law has been printed, however, in the record of the Consumer Subcommittee's July 22, 1982 Hearing on the "FTC's Authority Over Deceptive Advertising" (serial No. 97-134).

Proponents of the exemption often argue that any egregious advertising practices could still be attacked under the agency's authority over deceptive trade practices. While I acknowledge that the lines of demarcation between deceptive and unfair trade practices are sometimes blurred, I am no at all certain that all potential forms of abusive advertising could be addressed under deception authority alone. In the past, we have brought several significant cases challenging ads directed at children which depict dangerous or potentially dangerous behavior. The theory of those cases was not necessarily that children were deceived into thinking that such behavior was safe, but rather that they are not able to determine that it is dangerous and, therefore, it is unfair to give them the misimpression that it may be safe or desirable behavior. Further, I am not sure the public would be at all reassured by a congressional decision to remove a portion of the Commission's jurisdiction which has existed for 45 years on the asserted ground that this authority is suddenly unnecessary or extraneous. Rather, I believe the public perception is more likely to be that the Congress has decided to permit, unchallenged, advertising which may be unfair.

Turning to the professions issue, I want to reiterate how much my colleagues and I appreciate the efforts of all those who have opposed the exemption sought by the American Medical Association (AMA), the American Dental Association (ADA) and the American Optometric Association (AOA). As you know, the Commission is united in its absolute opposition to this exemption and its belief that continued FTC jurisdiction over State-licensed professionals and their professional associations is crucial to the important public interest of maintaining free and open competition in the health care and other service industries.

As I look back over the events of the past year—which have lent this issue a sense of drama, if not melodrama—I cannot overcome the disturbing sense that there were really two Federal Trade Commissions under fire in this debate: the FTC whose activities I consider and vote upon every day and the FTC portrayed in the most gravely distorted terms by those who ask you to exempt them from the laws the agency enforces. Almost always when the Commission appears before this committee or its House counterpart to explain and justify the agency's actions, I believe that the issues have been fairly joined; that is, the Commission and its critics have reached different conclusions out of the same set of facts and are basically disagreeing on the merits of the policies or procedures which underlie the agency's activities. On the most productive occasions, the dialogue prompted by the oversight process leads to a clearer understanding by the Commission and whatever constituency is involved that the problems which have arisen can be resolved through the establishment of a better dialogue and modified behavior on both sides.

But the debate over the professions exemption has totally departed from that productive model. For whatever reasons, the proponents of this exemption have chosen to justify their proposal with allegations about how we have exercised our authority that bear absolutely no relation to reality.

For example, proponents of the exemption have argued that FDC enforcement activities fundamentally undermine their ability to ensure the quality of the care doctors, dentists, and optometrists provide to their patients because the FTC is constantly second-guessing sensitive decisions concerning appropriate medical treatment standards which have been made by experts.

The truth is that the exclusive focus of FTC enforcement activities is the business or commercial practices of State-licensed professionals. The FTC has challenged illegal restraints on trade such as price-fixing, boycotts, bans on truthful advertising and the deceptive promotion of health care services. A careful study of federal and state court cases involving such challenges by the FTC, the Justice Department and the state attorneys general reveals that quality of care concerns have been raised before the courts but have never been accepted by them as legitimate justifications for these kinds of illegal commercial behavior.

The Commission has never overruled or sought to overrule State licensing board decisions concerning the qualifications, education or testing of State-licensed professionals. The Commission has sought only to override State regulations on one occasion: the 1978 Eyeglasses Rule prohibited flat bans on commercial advertising by eye care specialists. That portion of the rule was remanded to the FTC by the Circuit Court of Appeals because the Supreme Court in the 1977 *Bates* decision [2] had already prohibited such bans (by the legal community specifically) and the Circuit Court felt the Commission should have given the States more time to comply with those requirements (in other professional areas) on their own. The Eyeglass Rule's other major provision—requiring eye doctors to give patients copies of their prescriptions so that they can comparison shop—remains in effect. Evidence on the rulemaking record indicates that the rule has saved consumers millions of dollars a year in eye care costs.

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[2] *Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977).

Proponents of the exemption also argue that the FTC has virtually crippled the professions' ability to operate legitimate peer review programs that investigate patient or health insurer complaints concerning the appropriateness of the fee charged or care provided in individual cases.

Again, the truth is that the FTC has never brought a law enforcement action challenging the activities of a peer review board which seeks to set ethical or quality of care standards for its profession. The Commission's order in the *AMA* case [3] expressly states that peer review is not restricted in any way, and the legality of peer review was never an issue in that case.

In recent years, the Commission has strived to clarify its policy toward peer review. For example, it recently issued an official advisory opinion in response to a request from the Iowa Dental Association that approved the association's planned program of peer review of fees. It has never been the Commission's goal or intent to interfere with standard setting by legitimate peer review organizations. But, like other beneficial programs, peer review can occasionally be abused. Price-fixing conspiracies or coercive boycotts directed against health maintenance organizations should not gain immunity from the antitrust laws merely because they are labeled "peer review" or "Self-regulation".

Finally, advocates of the exemption have argued that the FTC has prevented State medical societies from participating in cost containment talks with State medicaid programs because the agency alleges that such a dialogue is "collusive".

The truth is that the FTC has never prohibited, challenged or even counseled against physician or medical society participation in discussions with State medicaid officials or insurers concerned about escalating health care costs. The Commission has taken action only when medical and dental groups have organized economic boycotts of State medicaid plans or insurers who tried to establish cost containment programs. The primary example of FTC activity in this area is the Commission's recent decision in the *Michigan State Medical Society* case.[4] The Commission found that the medical society had organized and threatened a boycott by its members of patients enrolled in the State's medicaid program. It also found that the medical society had sought to obstruct cost containment efforts and was attempting to maintain high prices for medical care. However, in enjoining such illegal conduct, the Commission issued an order containing explicit provisions recognizing the right of the State society to participate in cost containment discussions and professional peer review of fees, and to advocate its views, on its own behalf or on behalf of its members, to third-party payers concerning any issue, including reimbursement.

I realize that this recital of the FTC's track record does not address the concern expressed by some that the law does not explicitly forbid FTC interference in the critical judgments professionals must make in order to satisfy their ethical responsibilities to deliver the best possible care to the public. My response is a practical one born of experience and common sense: It is inconceivable to me that a day might come when the agency would be so free of the checks and balances of the system in which it operates—including, most prominently, regular review of its activities by the Congress and the Federal courts—that it could, under misguided leadership, take the unwarranted and destructive actions some critics hypothesize. In any event, such hypothetical concerns cannot justify an exemption. At most, they argue for an effort to reasonably define the parameters of the agency's authority.

I remain of the view that any definition of the FTC's authority is unnecessary or at least premature, and that the Congress should retain the legal status quo in this area. However, I also recognize that members of this committee may not share that view and may prefer to propose and support a compromise in the context of the committee's reauthorization bill as an alternative to a total exemption.

Last session, the primary formulation of such a compromise was an amendment sponsored by Congressmen Dingell, Broyhill, Florio, and Lent which had two basic elements: first, it applied the State action doctrine to the Commission's antitrust jurisdiction; and second, it contained a flat prohibition on any exercise of the Commission's unfairness jurisdiction to invalidate State laws concerning "education, training or experience" requirements or the "permissible tasks and duties" of State-licensed professionals unless such laws prescribe "business or commercial practices."

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[3] *American Medical Association, et al.*, 94 F.T.C. 701 (1979).

[4] *In the Matter of Michigan State Medical Society*, Docket No. 9129 (February 18, 1983).

I believe that this amendment represented an equitable and moderate solution which would effectively put this matter to rest. It would clearly permit the Commission to continue to pursue traditional law enforcement aimed at price-fixing, boycotts and other forms of collusive conduct, as well as unfair, deceptive or fraudulent trade practices by members of professional groups. I stress my belief that the amendment was and is a carefully balanced piece of legislation and that deleting any portion of it could seriously undermine its intended effects. Specifically, the amendment was, I believe, designed to ensure that the FTC can never use its consumer protection authority to supplant a State regulatory board's expert judgment concerning the qualifications, skills and competence professionals must possess before they are licensed to practice their profession. This crucial clarification of the agency's role fully addresses the concern that it might in the future undertake to second guess sensitive quality of care judgments. At the same time, by expressly reaffirming the Commission's authority to police unfair business or commercial practices, the amendment ensured that the Commission would not be eliminated as an effective force for promoting competition if the specific professional groups which frequently dominate State boards use their regulatory authority to act outside the board's legitimate function by suppressing competition in the delivery of professional services to the public.

The amendment successfully sponsored by Senator Rudman during the last days of the lame duck session was modeled on the Broyhill amendment. However, it eliminated the provision explicitly preserving Commission authority over "business or commercial" practices.[5] I have some concern that the elimination of this concept from the Rudman amendment could be read as an open invitation for such dominant groups to shield otherwise illegal, anticompetitive activity behind the illusory structure of a legitimate licensing operation. I am certain that this result was not intended by Senator Rudman and it is possible that any potential problems stemming from this change could be addressed in the legislative history accompanying such an amendment, although I would prefer to see them addressed in the amendment itself.

Proposed alternative "compromises" to either the Broyhill or Rudman amendments have surfaced since the committee indicated some weeks ago that it would begin anew the process of reauthorizing the Federal Trade Commission. There has not been time to develop full analyses of these proposals, many of which have, in any event, been proposed only informally. I would respectfully request that the committee allow me an opportunity to present written views on any proposed alternatives which survive preliminary scrutiny and emerge as serious candidates for your consideration.

Although it is always difficult to comment constructively in the absence of specific statutory language, I would like to take this opportunity to address briefly a few of the concepts which underly the more enduring proposals. All have been presented by their authors as significant "compromises" which will put this issue to rest once and for all. On the basis of the preliminary drafts I have seen, I must dispute this characterization. Most, if not all of the suggestions I have reviewed sacrifice significant portions of FTC jurisdiction and some come within a very short distance of operating as a total exemption.

Thus, for example, some have advocated that you amend the current exemption for non-profit organizations to cover national, state and local medical and other professional trade associations. This approach would allow such associations to impose advertising bans, fix prices and organize boycotts of insurance cost containment programs with impunity. About the only activities that would be left to FTC antitrust enforcement would involve collusion among groups of individuals, who would soon learn that all they needed to do to immunize their conduct is to organize as a professional association.

Other proposals would introduce a requirement that the courts and the Commission depart from over a century of antitrust tradition and precedent to introduce into their analysis of the pro and anti-competitive effects of a practice some quantification of the activity's effect on other social values. Almost since the antitrust laws were first conceived in this country, they have faced this kind of fundamental challenge by those seeking to justify collusive behavior on the grounds that they know what is best for society. Any congressional effort to adopt this approach, even in the health care industry, would have the most profound and disruptive effects on the basic values the antitrust laws are designed to protect.

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[5] Another difference from the Broyhill amendment which appears in the Rudman amendment is that the latter applies restrictions to the FTC's antitrust authority which in the Broyhill amendment applied only to its consumer protection authority. (The Broyhill amendment simply codified that the "State action" doctrine applied to the FTC's Section 5 antitrust jurisdiction.) It is my understanding that this aspect of the Rudman amendment was an inadvertent drafting error which hopefully would be corrected if the amendment is again proposed for Senate action.

Finally, some of the proposed "compromises" seek to immunize conduct which "conforms with State law" from FTC scrutiny.[6] While these proposals purport to address the legitimate concern that the Commission should not preempt the judgment of the States in sensitive licensing matters, their actual operation would go far beyond this arguably legitimate purpose. Read most conservatively, such provisions would immunize any conduct which does not actually violate a State law. Thirteen States do not have antitrust laws which apply to the profession and in such states, the Commission could be precluded from challenging blatant violations of Federal antitrust standards. Read more reasonably, such provisions would call into question whether the Commission could challenge conduct in areas where the States have regulated even partially. Thus, the agency would become embroiled in lengthy disputes concerning whether a state has in fact "occupied the field" in a given area. For example, a state policy favoring cost containment discussions could be used to shield the use of such discussions to accomplish simple price-fixing. The Supreme Court has consistently held for 40 years that a State regulatory scheme that merely permits private parties to fix prices or otherwise conspire in restraint of trade does not exempt such activities from Federal antitrust laws.

DEFINITIONS OF "DECEPTION" AND "UNFAIR METHODS OF COMPETITION"

I remain unalterably opposed to proposals to redefine the Federal Trade Commission's jurisdiction over deceptive trade practices and unfair methods of competition. All of the proposals which have been advanced so far to alter the statute's language would substantially narrow the FTC's authority. I am unaware of any sustained criticism of the Commission's actual exercise of its jurisdiction which might arguably justify these efforts to change the statute. Those who live with the standards of conduct the agency has developed over the years appear to understand well both the law's parameters and the agency's procedures for enforcing it. In short, my observation is that the system not only works, it works effectively for all concerned.

As the committee is aware, it is no trivial matter to alter decades of jurisprudence. If the prohibitions on deceptive practices or unfair methods of competition are redefined, no matter how benign the intentions of those making the change, the natural assumption of the legal community, including State and Federal judges, will be that Congress intended to change the actual effect of the law. The inevitable result will be that at least some deceptive or anticompetitive practices which are now illegal under current law will become legal, as judges and lawyers are cast adrift from precedent to search for the new law's meaning. Only one thing is certain—any change will be a bonanza for lawyers. With decades of legal doctrine in doubt, every new FTC case will have to be decided in an atmosphere of uncertainty concerning the applicability, if any, of established precedent.

As to the "deception" provision in particular, those making the various proposals have met every substantive criticism of the statutory language they suggest with complex explanations of the interpretations they intend their new redefinitions of the FTC's authority to have. The explanations and rationalizations they have found necessary to defend their proposed changes are astoundingly complex, internally inconsistent and sometimes strain the actual language they have proposed beyond credulity. Thus, we are left with proposals whose asserted purpose is to clarify and simplify the law, but which have themselves already generated an extensive literature of contradictory interpretations concerning their true impact.

Reacting to this confusion, and in the belief that such changes by the Congress would be perceived as weakening the agency's ability to police deceptive advertising or other trade practices, key members of the business community and the attorneys general of all 50 States have spoken out against these proposals. Representatives of major corporations have come, often very quietly, to visit Members of Congress behind the scenes urging inaction on these proposals. Underlying their concern is a fear that uncertain, ill-understood limitations on the agency's authority will return business, and advertising in particular, to a period when a few unscrupulous firms could promote deceptive claims with impunity, destroying the public's already fragile belief in the basic integrity of commercial advertising. They realize, I think, that any major surgery on the agency's basic statute could cause damage which would take years to sort out

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[6] I stress the word "scrutiny" since these proposals would bar the Commission from even investigating such activities to determine whether they qualify for this exemption. Thus, even investigations of conduct falling outside the exemption could become enmeshed in jurisdictional challenges which would take years to resolve.

The testimony I gave before the Senate Subcommittee on the Consumer last July contains extensive quotations of these views, as well as a detailed analysis of the various proposals to narrow the FTC's deception authority which had been advanced at that time. I have attached that testimony to this statement. I have not formally prepared a comparable analysis of any proposals to redefine unfair methods of competition because I have not yet seen a concrete formulation of statutory langauge which has been treated with any seriousness by the Congress. Should such proposals gain any credibility, and I sincerely hope that they do not, I would ask for the opportunity to provide this committee with a fuller statement of my views.

LAW ENFORCEMENT REMEDIES

When Congress passed the Magnuson/Moss-FTC Improvements Act in 1975, it did so with the clear intention of revitalizing an enforcement agency whose arsenal of remedies had not kept pace with the times or evolving business practices. The agency's authority to obtain redress and civil penalties for ongoing law violations were crucial aspects of this effort to give the FTC's enforcement initiatives some teeth.

Now, less than a decade after that major step, some members of the business community are urging you to reverse much of the progress which was achieved in this area with the passage of Magnuson-Moss. Specifically, they recommend that the Congress place either a $100,000 or $500,000 cap on the amount of penalties the Commission can assess in individual cases and abolish the Commission's authority to enforce clear holdings of prior litigated precedents through service of a synopsis of those decisions on relevant businesses.

Proposals to place either a $100,000 or $500,000 cap on civil penalties assessed for a "related series of violations" are apparently based primarily on the $1,750,000 penalty awarded by a district court judge, and upheld by the Third Circuit Court of Appeals, in a Commission case challenging deceptive promotional mailings by Reader's Digest. The case involved over 17 million pieces of mail sent by the company in direct disregard of the prohibitions on such deceptive practices contained in an outstanding Commission order against the company. In explaining the penalty he awarded, the district jugde noted: "While this amount may seem large, it amounts to no more than 10 cents per violation and only 2 cents more than Reader's Digest expended for postage in the violative mailings. While this penalty is not insignificant, it is no more than a moderate one when compared to Reader's Digest's financial resources. A civil penalty should be more than a mere 'license fee' or 'an acceptable cost of violation' of an order and should provide a 'meaningful deterrence.' " *United States* v. *Reader's Digest Association, Inc.*, 494 F. Supp. 770, 779 (D. Del. 1980), Aff'd, 662 F.2d 955 (3d Cir 1981).

Recently, a district court judge in Oregon imposed a penalty of $4 million for violations of a consent agreement requiring the Louisiana-Pacific Corporation to divest itself of a manufacturing plant it owned in Rocklin, California. In ordering this unprecedented penalty, the judge wrote: "I look at five separate criteria in my effort to arrive a suitable penalty figure: (1) the good or bad faith of the defendant in violating the order; (2) the injury to the public resulting from a violation; (3) the benefits derived by the defendant from its violative activities; (4) the defendant's ability to pay a penalty; and (5) the need to deter similar behavior by the violator and others and vindicate the authority of the Federal Trade Commission and the integrity of its orders. . . . I have concluded that L-P fell short of good faith in its efforts to divest Rocklin and a deterrent is called for—one that will deter L-P in the future as well as others that would regard a modest penalty as an acceptable cost of doing business. Delay in compliance must be discouraged, not encouraged. . . . Further, vindication of the FTC is an important element. Congress armed the FTC with powers and responsibilities and its orders should not be disregarded with impunity". *United States of America* v. *Louisiana-Pacific Corporation*, (E.D. Ore. December 28, 1982) Slip op. at pgs. 6 and 15.

Most of the amounts assessed under the Commission's civil penalties authority are the result of consent judgments and fall considerably below the $500,000 mark; several, however, have exceeded the lower $100,000 figure. The substantial penalties assessed in the two matters above represent extremely rare cases. But I think they demonstrate the importance of the deterrent function of civil penalties—a function which would be severely undercut if a cap is imposed. If penalties can or do exceed the profits realized from the illegal practice (as they did in the above case) that fact or the potential alone serves a deterrent purpose. In some cases, such profits can easily exceed $500,000, an amount which, I would also note, would not be adjusted for inflation in any of the proposals I have seen.

As for proposals to repeal Section 5(m)(1)(B) of the Federal Trade Commission Act, which gives the Commission authority to obtain civil penalties for violations of law identified clearly in prior litigated cases, I believe such recommendations are based on exaggerated fears that the authority could be used at some future time to railroad law abiding companies and ignore the clear protections the law provides to companies whose activities are challenged under its provisions. Specifically, Section 5(m)(1)(B) says that:

(1) The particular conduct in question must have been previously determined to be deceptive or unfair by the Commission in a Section 5 administration adjudiction;

(2) The Commission must have issued a final cease and desist order in that proceeding with respect to the particular conduct at issue; and

(3) The company charged with a violation of the law articulated in the prior decision must have "actual knowledge" that the particular conduct in which it engaged was deceptive or unfair and unlawful under section 5.

Court cases have added yet another procedural safeguard to the list: recipients of a "synopsis" notifying them of princples of law established in prior Commission decisions must be given the opportunity to challenge the legal basis for the Commission's decision in the underlying case. Last year, the committee included a provision codifying this court holding in H.R. 6995. As I have indicated, I believe this approach is an apporpriate way to address the concerns raised by members of the business community regarding this important element of the Commission's remedial authority. Section 5(m)(1)(B) was enacted to relieve the Commission of the costly and unnecessary burden of proving over and over again in a series of individual cases, basic violations of established FTC law. Efforts to turn the clock back to a period when a simple, prospective cease and desist order was the only remedy severely weaken the FTC's enforcement effectiveness.

Mr. Chairman, that completes my prepared remarks. I would be pleased to answer any questions you may have.

[The following information was subsequently received for the record:]

QUESTION OF THE MAJORITY AND THE ANSWER THERETO

Question. Please describe any ideas you may have for statutorily expanding the authority of the Commission or improving Commission procedures or remedies so that the Commission may be more effective in protecting consumers.

Answer. Contemplating my answer to this question has caused me once again to focus sharply on the goals I hope will be achieved by the FTC's 1983 reauthorization process. Ultimately, I realize that for me, the necessary, most important affirmative agenda for the Commission at this time is this:

First, it is imperative for the Congress to decide affirmatively to put to rest, hopefully once and for all but at least for a decent interval of several years, any and all efforts to obtain special interest exemptions from the Commission's jurisdiction, such as those sought by the American Medical Association and the advertising industry. Second, it is crucial to the Commission's future effectiveness that the Congress reject all proposals to redefine and narrow the Commission's statutory authority over deception and unfair methods of competition and its remedial authority in such areas as the assesement of civil penalties. If these serious threats to the institutional viability of the agency can be avoided and rejected for the forseeable future, the Commission will be in a stable atmosphere for the first time in several years. If that kind of stability can be achieved, the agency would be able to channel its full energies on enforcing the FTC Act and the 20-plus other statutes the Congress has assigned to it to enforce. Then, if it proved unable or unwilling to do so, Congressional oversight could provide a forum in which to address that issue. In short, and plainly put, it is difficult for me to consider seriously any new expansion of FTC authority while the agency remains in circumstances that make it difficult to exercise effectively the authority it already possesses. While I share Commissioner Pertschuk's interest in and concern about such consumer protection programs as nursing homes and automobile defects, these programs can be revitalized without statutory amendments to the FTC Act; however, they would be undermined, probably fatally, by the adoption of any of the current proposals to narrow or eliminate the Commission's legal authority.

If the Committee believes that my definition (above) of the essential affirmative agenda for the Commission is achieveable during the current authorization process, and that it wishes to consider other, positive amendments, then I would suggest only one at this time. The Commission's authority to obtain redress for consumers injured by unfair and deceptive practices is needlessly cumbersome and so time consuming that it is virtually unworkable in the typical case. It would be very useful if the Committee would streamline Section 19 to eliminate the need for two separate lawsuits: the first to determine liability and the second to obtain redress for defrauded consumers.

QUESTIONS OF THE MINORITY AND THE ANSWERS THERETO

Question. If deception were defined to include some "notion of materiality" as well as a reasonableness standard, what practical effects would that have on Commission enforcement of deceptive advertising cases?

Answer. The law of deceptive commercial practices, developed by the FTC over the past 45 years and based on centuries of Anglo-American common law, already incorporates concepts of "materiality" and "reasonableness".

For example, in order for an allegedly deceptive claim in an advertisement to rise to the level of legal deception, it must be "material," that is, significant to a purchasing decision. The opposite side of that coin is that an ad may be technically correct in all of its claim, but be deceptive if it omits a "material" fact. An example of the latter is: if a company is selling land (in for example Florida) using advertising and/or in-person sales pitches to those located far from the property, it might describe the land correctly in all respects except fail to mention that frequent flooding causes the land to be repeatedly underwater. Because the fact that the land was often flooded would be a "material" fact to those who may consider purchasing it, omission of that material fact could be found to be deceptive.

In the case of "reasonableness," the Commission does not challenge claims which clearly would only deceive consumers who might respond unreasonably under the circumstances to an advertising claim. At the same time, the Commission recognizes that "reasonable" must be flexibly applied, especially when we are confronted with circumstances in which hundreds or thousands of Americans have responded to certain claims by engaging in a purchasing pattern. Trying to assess whether actual or potential consumer responses to some allegedly deceptive advertising claims (or material omissions of fact) would be reasonable or not is most often not terribly difficult. Sometimes, however, it is; and it is in those cases that the Commission seeks empirical data, surveys and copy tests to assist in making that assessment.

The point to focus on, which is posed by this question is: how would that assessment be made clearer by writing into the statute a requirement of "reasonableness?" How would the Commission's assessment of whether a fact—asserted or omitted—was "material" be made more certain by writing that standard into a statute? The answer, I believe, is clearly that it would not in any way promote business certainty, if that is the goal, because the Commission would still be faced with the same task, as would advertisers. We would still, case by case, have to decide if a claim was material; if an ad omitted a material fact; and if, in the circumstances, it would be reasonable for consumers to react to those deceptive material assertions to omissions.

If writing those standards into the statute would not improve the certainty of the judgments which constitute law enforcement by the FTC, would it in any way harm or restrict enforcement? The answer here is clearly yes, for one or both of the following reasons.

All FTC decisions are reviewable by the federal courts (which, incidentally, have repeatedly endorsed the grounds for our decisions and reversed us when they believe we have inadequately applied the law or failed to prove the elements of deception). Courts rightly assume that the Congress does not legislate for no purpose. In the case of a 45 year old statutory provision, not heretofore "defined"—even if well defined judicially—the courts may (or predictably will) assume that Congress intended to narrow the definition of deceptive trade practices. That assumption would be both natural and inevitable because those advocating such changes have been clear that their purpose is to narrow the Commission's deception authority by statute. Any redefinition of deception enacted in the atmosphere created by those assertions would therefore be interpreted as a narrowing of the meaning of "deceptive practices." Should that happen, law enforcement would be severely hampered through whatever period of time it took to establish with any clarity what the new law meant. Both the Commission and the courts would be cast adrift from a long and certain body of judicial precedent.

The second difficulty would arise from the probable assumption by the courts (and perhaps by the Commission) that with those standards in the statute the Commission could no long draw inferences of "materiality" or "reasonableness." Instead, perhaps, the courts would require the Commission to prove those concepts as an element of demonstrating a "deceptive" law violation. If that were to happen, and it is probable that it would, enforcement of the law against deceptive trade practices would grind virtually to a halt. Presumably, in order to prove "materiality," the Commission would have to undertake lengthy and expensive surveys to demonstrate that a statistically valid majority of those surveyed actually found the fact that land is frequently flooded "material" to their purchasing decision. In other instances, the Commission might be compelled to show that consumers who actually saw the ad only purchased the product of service in question because of the deceptive claim. If we were unable to prove that, our claim of materiality might fail. Such surveys for ongoing enforcement activities would be prohibitively expensive and, for all practical purposes the necessity to undertake them in every action would paralyze enforcement.

The same practical proof requirement would face the Commission where the "reasonable" consumer is concerned. Expensive surveys aside, I'm not at all sure how the Commission would prove that only "reasonale" consumers were deceived. Is reasonable a number? A percentage? How many? An age group? An income group, Educational level? In a recent oral argument before the Commission, the Chairman asked if there were evidence in the record to indicate the average income of those who purchased the product in question, as a surrogate for their educational level. The question apparently was directed at an inquiry about the reasonableness of the purchasers' decisions. While perhaps an interesting question in the abstract, the underlying assumption (if proof is sought) makes me uneasy, as I am aware of no empirical evidence that I would rely on which establishes that educational level, or income level is a certain predictor of reasonable behavior.

Those advocating a statutory redefinition of deception have attempted to reassure the Congress, and the Commission majority which opposes such changes, that they do not intend their proposals to operate in the manner I have described. Proof in the form of elaborate consumer surveys would only be necessary, they tell us, in "close" cases. I find these efforts at reassurance and clarification highly ironic. For it is precisely because the Commission allegedly cannot be trusted to distinguish between "close" and "clearcut" cases of deception that the statutory circumscription of its deception that the statutory circumscription of its deception authority is asserted to be necessary. In any event, I see no reason why and know no way in which the courts could be expected to make those distinctions. The fact is they wouldn't—and proof would be required in all but the most flagrant cases (which usually are settled anyway without trial or court review).

Question. Please give the Committee your views on the proposed funeral rule.

Answer. I have attached a copy of the statement[1] I issued when the Commission voted to promulgate the Funeral Rule in July 1982. As that statement indicates, I fully support the final Funeral Rule. I believe that the rule's emphasis on the disclosure of price information at early stages of this most difficult consumer transaction will go a long way toward remedying many of the deceptive practices which the rulemaking record documents to be prevalent in this industry. I would, of course, be happy to address any additional specific questions the Committee or individual members have about any aspects of this proceeding or the final rule.

Question. Do you agree that the Supreme Court in Dr. Miles and subsequent cases established as the law of the land that resale price maintenance is for per se illegal?

Answer. Yes, I do. Since the decision in *Dr. Miles,* 72 years ago, declaring resale price maintenance to be illegal per se, the Supreme Court has through countless cases steadfastly reiterated the same view. It has carefully scrutinized a variety of vertical arrangements to ensure that, even if otherwise legal, they do not tamper with pricing or do not have as their actual purpose to fix resale prices. As recently as last summer in the *Maricopa* case, the Court provided some reaffirmation of its view that resale price maintenance is illegal per se.

I am aware of scholarly opinion which asserts that resale price maintenance is not always anti-competitive. I am also aware that scholarly and other opinion on that subject is not unanimous and in any event legal doctrine is clear: price-fixing, whether vertical or horizontal, is so pernicious and destructive of competition, that the courts (and thus the Commission) need not even entertain any alleged justification for its existence—if it exists, it is illegal without more.

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[1] The statement has been retained in the committee files.

Question. Do you agree that your enforcement of resale price maintenance has diminished substantially?

Answer. I agree that it has diminished, but I am not sure that "numbers" are the most significant measure of the problem. The real question of practical importance to retail businesses is whether the fragile web of fairly widespread voluntary compliance (fostered by the enforcement policies of the Government) is beginning to break down because of the well-publicized position of the Justice Department and perhaps the growing sense that the FTC may no longer be so vigilant in detecting and prosecuting vertical price-fixing.

Question. In your opinion, is there any justification whatsoever for a manufacturer setting and enforcing a minimum sales price for its goods?

Answer. No. Under current law, there is no legal justification.

Question. Should injury to business competitors or injury to the marketplace by a deceptive ad be examined by the FTC?

Answer. There are three ways, of concern to the FTC, in which a deceptive ad can be harmful: to competitors, to the competitive marketplace or to consumers. In almost all cases in which deceptive ads are disseminated, all three are injured.

However, it is my clear understanding from the legislative history and the circumstances of its passage, that the purpose of the Wheeler-Lea Act of 1938 (which inserted "deceptive practices" into Section 5 of the FTC Act), was to permit the Commission to find a practice, in particular an advertisement, to be deceptive if it were so and could injure consumers, without having also to prove that it injured competitors or competition. Thus, while I believe that deceptive advertising clearly injures competition and also honest competitors, the law does not require, nor do I believe it should, that the FTC examine or prove injury to competition in order to find an ad to be deceptive.

At the same time, showing injury to competition in most instances of deceptive advertising would not be difficult—it is an almost inevitable consequence of deceptive advertising. In fact, we are often led to deceptive advertising, which may be localized and otherwise not come to our attention, by competitors. For example, not too long ago, the Commission received a number of complaints from automobile dealers and from new home sellers that their competitors were understating the actual interest rates they offered to finance such purchases. While this practice clearly harms consumers, who may be misled in their efforts to shop for the most reasonable interest rate (a matter of great concern these days), it also adversely affects honest competitors who, by adhering to the law in advertising their rates, were losing business because they lost those initial consumer contacts which so often evolve into final sales.

As for the issue of injury to the integrity of the marketplace, the clearest example of this concern is the view repeatedly expressed by most members of the advertising industry that the advent of the Commission's substantiation program enabled the industry to reverse the growing public distrust of advertising because the program demonstrated the Commission's strong commitment to the principle that the marketplace should operate free of false and misleading claims. This belief in the positive influence of FTC enforcement on the integrity of advertising in the marketplace has inspired several key members of the industry to oppose proposals to redefine and narrow the Commission's deception authority because they fear that a diminution of the Commission's presence will return advertising to the days of low public confidence and credibility.

Question. What effect will defining "deception" have on the ad substantiation program if the current restrictions on "unfairness" jurisdiction over commercial advertising are continued?

Answer. As this question perceptively acknowledges, the Commission's advertising substantiation program is based both on unfairness and deception authority. The restrictions on the agency's unfairness authority which were contained in the 1980 Improvements Act for the life of the authorization, and then extended for the life of the current Continuing Resolution, prohibit promulgation of any trade regulation rule based on an unfairness legal theory. Since the substantiation program has its legal basis in past cases, not rules, it has not been directly affected by restrictions in current law. However, the advertising trade associations have asked the Congress to exempt all commercial advertising from the law's prohibition against unfair practices. Indeed this Committee did so in S.2499 during the 97th Congress. That exemption would apply to both cases and rules and would effectively eliminate "unfairness" as a basis for the Commission's advertising substantiation program, leaving only deception as the legal underpinning for the substantiation doctrine.

If deception were redefined and narrowed, as has been proposed, I believe that the substantiation program would be severely undermined, if not eliminated as a practical matter. All of the various proposals to redefine deception have two common elements which would produce this result: they provide either that the Commission must prove empirically that actual, substantial consumer injury was caused by the deceptive practice or that the Commission must prove the advertiser acted with knowledge that the claim was in fact deceptive. Introduction of the first element—proof of actual injury—would mean that the Commission could never challenge a clearly unsubstantiated claim unless it could also prove the claim false because, as a practical matter, we would only be able to prove consumer injury where a claim was demonstrably false. At first blush, the imposition of such a requirement may not seem entirely unreasonable. But the Commission often finds itself in the position of challenging claims for which the advertiser has no or inadequate substantiation without knowing whether the claims are actually false. in fact, it is often the absence or inadequacy, of the substantiation which makes it impossible to determine whether the claims are true or false. Such cases are based on the common base principle that the advertiser—who manufactures the product or performs the service—is clearly in the best position to evaluate the product and should be held responsible for doing so before attempting to sell it to the public through use of baseless advertising claims. Introduction of a proof of injury requirement would eliminate such cases.

Proponents of redefining deception respond that such cases could still be brought under the "knowledge" prong of their deception test. But this second element of their proposals, especially the proposal advocated by the advertising industry trade associations, would lift the "knowledge" requirement to a virtual intent standard: the Commission could only act if it could demonstrate that the advertiser had "actual" knowledge the claim was false or acted "in reckless disregard" of its truth or falsity. As the earlier discussion indicates, the Commission is often unable to determine from inadequate substantiation offered by the advertiser whether or not the claim is true or false. It follows that we could not prove the advertiser "knew" it was false. As for demonstrating that the advertiser acted in "reckless disregard" of truth or falsity, this kind of legal standard has traditionally been interpreted in other contexts as demanding the most rigorous proof of virtually willful misconduct. The average substantiation case rarely produces evidence sufficient to meet such a standard.

Almost since I came to the Commission, I have heard the advertising community repeat its commitment to the substantiation program. It is, in my view, truly unfortunate that representatives of that industry do not acknowledge the ramifications of the legislative proposals they have endorsed. I do not believe that either proposal—the unfairness exemption or the redefinition of deception—is in the short or the long run interests of their industry.

Question. In your opinion, would setting standards concerning deceptive practices minimize uncertainty?

Answer. No. I believe doing so would create uncertainty. As my answer to "Question 1 from the Minority to Commissioners Bailey and Pertschuk" reveals, and as I have previously testified, I believe that enactment of any of the proposals to redefine and narrow the Commission's deception authority would provoke uncertainty in the business community, the bar and the courts concerning the meaning of the new law. Forty-five years of legal precedents, which have given meaning and certainty to the law of deceptive practices, would be cast into question and it could take that long again to return to the point of relative stability and clarity that exists at the present time.

Question. How would defining "deception" affect the FTC's authority over statements which are deceptive by omission?

Answer. It is uncertain what effect redefining deception would have on cases based on a material omission of fact theory. As my answers to other questions indicates, in such cases—and, for that matter, in all deception cases—the Commission could experience substantial proof problems, and difficulties in establishing what constitutes "reasonable" consumer behavior.

Question. What effect would Chairman Miller's proposal have on deceptive practices (other than advertising) challenged by the Commission?

Answer. The Commission's analysis of deceptive claims—whether they are contained in advertising, point of sales materials or communicated verbally by sales personnel—is the same. In fact, most of the land sales cases we have brought have involved deception in point of sale promotional materials and verbal misrepresentations by salesmen rather than national advertising campaigns. For the purpose of analyzing the likely impact of the proposals to redefine and narrow the Commission's deception authority, I would make no distinction between the format in which such practices occur. I would predict however, that the problems of proof would be so great, in for example the typical fraudulent land sales scheme, that the Commission would be unable to have any enforcement presence in that area of recurring deceptive practices.

Question. Would you oppose an extension (for the life of the authorization) of the 1980 Act's agricultural cooperative provision?

Answer. I would not necessarily oppose extension of this provision, with one caveat. The blanket prohibition on any Commission study of agricultural marketing orders makes it difficult, if not impossible, for the Commission to contribute to the current debate on the future of the marketing order system. The Commission's Bureau of Economics, for example, was conducting a study relevant to those larger issues which was abruptly terminated by the passage of the 1980 Act.

Question. Would you object to a permanent provision for legislative veto?

Answer. No, I would not. I have offered (beginning with my confirmation hearing in 1979) my concerns about the potential impact on Commission proceedings of the legislative veto: The possibility exists that staff level discussions or ultimate Commission decisions made with an eye to Congressional interest could cause a violation of the due process of those who participate in on the record proceedings; by law, Commissioners' decisions are to be based only on those record proceedings. Nevertheless, I understand the Congressional impetus for the veto and would not object to a permanent provision. In the event the Supreme Court should find the current veto provision to be unconstitutional, then the Commission would be in a nearly impossible legal position should the current provision be made permanent. I assume that in that event the Congress would revise the provision in some appropriate way and if so, I would not object to it.

Question. Do you believe the FTC has systematically misapplied the deception doctrine?

Answer. No, I do not. And I would point out that even those who advocate a statutory redefinition of deception have never even suggested that it has. At most they have managed after combining the hundreds of cases the Commission has brought in 45 years to produce only a handful to quarrel with. I would only add that all Commission cases are reviewable (and scores have been reviewed) by the federal courts which do not countenance occasional, let alone systematic, misapplication of the law of deceptive practices—something the critics of some past cases systematically fail to acknowledge.

QUESTIONS OF SENATOR LAUTENBERG AND THE ANSWERS THERETO

Question. Several members of Congress have expressed their concern about Chairman Miller's professed intention to exercise his "prosecutorial discretion" in enforcing the antitrust law governing resale price maintenance. In particular, many members from New Jersey have inquired about the status of the Commission's response to complaints by the Burlington Coat Factory, a clothing retailer, that it has been the victim of illegal resale price maintenance. In light of this Congressional concern, would the members of the Commission, individually or jointly, set forth publicly, and in clear detail, the standards it intends to apply in determining whether, in a given case, it is in the public interest to enforce the law prohibiting resale price maintenance?

Answer. I believe it is in the public interest that law enforcment agencies enforce the law. Sometimes that is difficult because the law is not entirely clear; but that is not the case where resale price maintenance is concerned. Here the law has been the same and unvaried for 72 years: resale price maintenance is illegal per se.

Question. Would the Commission also furnish statistics for each of the last five full years, plus the year to date, on the following:

The number of cases subject to a so-called "100-hour investigation" or "preliminary investigations" in which resale price maintenance was alleged;

The number of cases subject to a formal investigation in which resale price maintenance was alleged;

The number of complaint recommendations tendered by Bureau of Competition staff to the Commission in which resale price maintenance was alleged;

The number of complaints issued by the Commission in which resale price maintenance was alleged; and

The number of consent agreements entered involving resale price maintenance.

Answer. It is my understanding that the Commission's response to this question will be included in Chairman Miller's submission to the Committee.

The **Chairman**. Thank you.

Commissioner Douglas.

Mr. **Douglas**. Yes. Good morning, Mr. Chairman. I am happy and pleased to be here, and to be with you and your colleagues to discuss our reauthorization.

First, I would like to thank the committee for their unanimous support of my nomination last December. In the course of that nomination process, I recall that I was asked to answer a number of questions kindly provided by Senator Ford, but there was one question that was missing, which I suggest you might consider for future nominees, which is——

Senator **Ford**. Did I forget something?

Mr. **Douglas**. One additional question, Senator, might be to ask the nominee if he or she would subscribe to a Hippocratic oath for regulators. I think we all have something we might learn from our medical brethren—we have been dealing with them recently. The oath might be paraphrased to begin. "First, do no harm."

I think it would be well to impress upon the Commissioners of agencies such as this one, that, while they have a very important job to do in improving the welfare of consumers, it is also possible that inappropriate actions by the Federal Trade Commissioners can actually have paradoxical results and harm competition and harm consumers as well.

I think this is germane to the discussion we are having this morning concerning deception in advertising. I think it is easy to have the perception that a very vigorous and tough Commission bearing down on advertisers can do no harm, but must certainly be doing good for consumers. I would just like to cite one example of a recent case which indicates that a very tough, if you will, or overzealous interpretation of deception can actually injure consumers and injure the process of otherwise useful advertising.

I cite a case which came to our attention recently concerning a television advertisement which appeared in 1981 for the Volkswagen Rabbit. Mr. Richard Peet, president of Citizens for Highway Safety, appeared in the advertising campaign, which stressed the virtues of the Rabbit's passive restraint system. The advertisement constituted a major innovation in an industry in which the traditional wisdom was that safety does not sell, and thus was seldom advertised.

The Commission's New York regional office, however, feared that this television advertisement might be misleading. Specifically, the New York office was concerned that the spot had failed to disclose exactly what aspect of the Rabbit had been tested, had mistakenly suggested that Mr. Peet was an automotive engineer, a technical specialist, and by using a Washington, D.C., logo at the bottom of the ad, had implied that the tests in question had been conducted under the auspices of the U.S. Government.

Mr. Peet contends that the Commission's inquiry in this matter was harmful and ill-conceived. After a careful review of the advertisement, I can only agree. Not only does the interpretation given by the New York office to this ad seem unsupportable, but the Commission's action, although only in the form of a preliminary inquiry, may well have discouraged Volkswagen from building future advertising campaigns around the safety-enhancing quality of its vehicles.

At a time when public bodies are urging the automobile industry to educate consumers and devise effective means for improving passenger car safety, this chilling effect is especially unfortunate.

I give this example, Mr. Chairman, not as a unique case, rather, it is symptomatic of the problem which the chairman was discussing concerning the general understanding by the public and by the business sector of what a deception means. I think we do need a better understanding of what deception is. In this event, the perception of the advertising community, of the company, and even of our staff was conditioned by previous case law at the Federal Trade Commission in which there are numerous examples of very strange implied claims being read into ads.

While some of this can be treated by better administrative procedure at the Federal Trade Commission, I would submit that a sensible definition of deception, particularly stressing a reasonable interpretation standard, would be most beneficial.

Thank you very much.

[The statement follows:]

STATEMENT OF GEORGE W. DOUGLAS, COMMISSIONER, FEDERAL TRADE COMMISSION

Mr. Chairman and members of the committee, I am pleased to appear before your committee and offer my views on the Commission's authorization. I should note immediately that I was deeply gratified to receive your unanimous support for my nomination to the Commission, and I welcome this and other opportunities to discuss the agency's activities with you. I endorse the Commission's formal statement, and would like only to amplify several of its principal points.

Any discussion of the Commission's authorization should proceed from an awareness that this agency has a significant capacity to increase, or diminish, consumer well-being. In my two months as a commissioner, I have already seen several promising applications of the agency's law enforcement authority. These initiatives have impressed upon me both the basic need for the role we play and the availability of constructive, pro-consumer techniques for achieving important consumer protection and competition policy goals. Moreover, I believe that we have the mixture of skillful economists, attorneys, and support staff to do our job well. If we fall short in what we attempt, it will not be for a lack of high-caliber personnel.

As much as I am impressed with the need for the agency's functions, the current quality of its work, and the talents of its people, so too am I concerned by our institutional capacity to reduce consumer welfare when our powers are used unwisely. Recognizing this dual potential inherent in our powers, I would suggest that nominees to regulatory agencies consider adopting a "Hippocratic Oath for Regulators" which begins, "First, do no harm."

In my judgment the Congress can assist us in following such a principle by appropriate adjustments of the FTC Act. First, I urge you to consider amending Section 5 to define the Commission's authority to ban "unfair" acts or practices. I believe this change will increase the likelihood that FTC enforcement activities will genuinely benefit consumers. The definition contained in S. 2499 last session is, I believe, appropriate.

Second, I propose that this committee enact a definition of deception, as well. In my brief experiences at the Commission, I have observed how past applications of subjectively determined deception criteria can cause substantial consumer injury. Specifically, I am concerned that previously applied deception criteria lacked sensible standards for reasonableness and materiality. Too often the agency seems to have failed to ask whether the alleged act of deception actually injured consumers or was likely to cause injury. Without such standards, the FTC could, and did, bring enforcement actions that offered no benefit to consumers and wasted resources. But more important, such actions may have caused significant injury to consumers. Consider one example.

Earlier this month we received a letter from Richard Peet, the president of Citizens For Highway Safety, who informed us that the agency had discouraged Volkswagen from pursuing an advertising campaign which emphasized the safety features of its Rabbit. Mr. Peet had appeared in 30-second television advertisement which stressed the virtues of the Rabbit's passive restraint safety belt system. The advertisement constituted a major innovation in an industry in which the traditional wisdom was that "safety doesn't sell" and, thus, was seldom advertised. The Commission's New York Regional Office, however, feared that this television advertisement might be misleading. Specifically, the New York Office was concerned that the spot had failed to disclose exactly what aspect of the Rabbit had been tested, had mistakenly suggested that Mr. Peet was an automotive engineer or technical specialist, and, by using a "Washington, D.C." logo at the bottom of the advertisement, had implied that the tests in question had been conducted under the auspices of the United States Government.

Mr. Peet contends that the Commission's inquiry in this matter was harmful and ill-conceived. After a careful review of the advertisement in question, I can only agree. Not only does the interpretation given by the New York Office to the advertisement seem unsupportable, the Commission's action—albeit only in the form of a preliminary inquiry—may well have discouraged Volkswagen from building future advertising campaigns around the safety-enhancing qualities of its vehicles. At a time when public bodies are urging the automobile industry to educate consumers and devise effective means for improving passenger car safety, this chilling effect is especially unfortunate.

This episode suggests the importance of establishing deception criteria that require a reasonable interpretation of the advertisement in question and a direct inquiry in to whether the allegedly deceptive claims actually led, or would probably lead consumers to act to their detriment. Such criteria would increase the likelihood that the staff would base its decision to intervene—even at a preliminary stage—upon a more objective, scientific evaluation of the advertisement. Because, as here inquiries falling well short of a compliant can deter desirable advertising, it is essential that staff be guided by clearly delineated, economically sensible criteria, which would result from a well-conceived definition of deception.

As only the second professional economist to serve as a commissioner, I also want to convey to you some of my observations about the role of economists in the important work of the Commission. As I noted earlier, the enforcement of our statutory mandate can yield substantial benefits to consumers, but can also be counter-productive and injurious if improperly targeted. Economists at the FTC have an important, although not an enviable role of "keeping us honest"—reviewing proposed cases to see that the result of any proposed enforcement initiative actually enhances consumer welfare and competition. Performing this necessary, invaluable task on occasion causes some tension between economists and our excellent and aggressive enforcement attorneys. Nonetheless, I think the process is operating properly and does not stifle or hinder enforcement, but instead makes it more effective and beneficial for consumers while minimizing unintended harassment of business. But more important, the econometric talents of our economists can be of substantial direct benefit in identifying and bringing cases. Recently, the staff of the Bureau of Economics and the Bureau of Consumer Protection collaborated beautifully in using econometric techniques to identify and prove a case of age discrimination in granting credit. I have a particular interest in seeing these capabilities exploited more fully and have recently met with Dr. Wendy Gramm, Director of our Bureau of Economics, to discuss ways to accomplish this.

Second, as a former professor of economics, I must confess that we economists have often done a poor job in communicating our objectives and insights clearly. For example, I frequently hear statements (by noneconomists) that our concern with "economic efficiency" is somehow incompatible or inconsistent with a concern for consumer welfare. This betrays a misunderstanding of a concept which for economists is a "term of art." In fact, the concept of economic efficiency is based precisely on the goal of maximizing consumer welfare. Pursuing economic policies inconsistent with economic efficiency is a sure way to reduce consumer welfare. Our understanding of how market processes operate gives important insights into when and how intervention is justified and can improve consumer welfare, and equally important, when it cannot.

In my years of close professional association with attorneys, I know I have learned a lot. It is my hope that in my tenure at the FTC the reverse will also hold, and that together we may develop a more effective and beneficial Federal Trade Commission.

[The following information was subsequently received for the record:]

QUESTION OF THE MAJORITY AND THE ANSWER THERETO

Question. Please describe any ideas you may have for statutorily expanding the authority of the Commission or improving Commission procedures or remedies so that the Commission may be more effective in protecting consumers.

Answer. I have no specific suggestions for statutory adjustments to the Commission's substantive powers beyond the proposals I have made for defining the agency's consumer protection authority to proscribe unfair or deceptive acts or practices.

I would also mention that the Commission's procedures for adjudicating cases and promulgating final decisions appears worthy of attention. Over the past fifteen years, several major commentaries on the Commission have expressed concern that the FTC had failed to develop effective internal controls for bringing its law enforcement efforts to a timely conclusion. See, e.g., "Report of the American Bar Association Commission to Study the Federal Trade Commission" 15, 81 (1959). Upon arriving at the Commission, I was surprised to see the length of time it took the Commission to issue final opinions in some matters for which oral argument had taken place long ago. I noticed, for example, that the Commission has yet to decide two matters in which the Commission heard final oral argument in the first part of 1980, over three years ago. The solutions to this type of delay may well prove to rest in internal management changes which the Commission itself must undertake. I expect to devote my own attention to this matter, and will keep the Committee informed of any specific respects in which it appears legislative action may be required.

QUESTIONS OF THE MINORITY AND THE ANSWERS THERETO

Question. Please give the Committee your views on the proposed funeral rule.

Answer. The proposed funeral rule addresses an area of legitimate concern for consumers. The investigation and deliberations took place well before I joined the Commission and involve a very extensive record which I have not as yet examined. It would not be appropriate for me to comment on the important issues raised in this rulemaking procedure at this time.

Question. Do you agree that the Supreme Court in *Dr. Miles* and subsequent cases established as the law of the land that resale price maintenance is per se illegal?

Answer. I believe it is correct to say that the Supreme Court has established a rule of per se illegality for resale price maintenance (RPM). The Court first articulated this position in *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U.S. 373 (1911), endorsed the per se treatment in *Continental T.V., Inc.* v *G.T.E. Sylvania, Inc.*, 433 U.S. 36, 51, n.18 (1977), and reiterated this principle in *California Retail Liquor Dealers Ass'n.* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 102 (1980).

The strength and durability of the Court's commitment to accord per se illegality to all instances of RPM is less than wholly certain. The Court recently accepted certiorari in a case (*Monsanto Co.* v. *Spray Rite Service Corp.*, 51 U.S.L.W. 3627 (U.S. March 1, 1983) (No. 82-914)) which affords the court an opportunity to address the desirability of continuing a per se ban upon RPM. The Court could decide the case without reaching this issue, although the Department of Justice has urged it to use the case as a means of overturning *Dr. Miles* and its progeny.

Two factors could be particularly important to the Court's treatment of *Monsanto* and any future cases raising RPM question. First, it is possible to detect a willingness on the part of some lower courts to carve out exceptions to the total ban on RPM. See, e.g., *Eastern Scientific Company* v. *Wild Heerbrugg Instruments, Inc.*, 572 F.2d 883 (1978). Such a process of erosion and qualification served as a precursor to the Court's decision in *GTE-Sylvania* to overrule the per se ban on non-price territorial restrictions laid down in *United States* v. *Arnold Schwinn & Co.*, 338 U.S. 365 (1967).

The second, and perhaps more significant, consideration is the direction of modern scholarly commentary on the subject of RPM. For the past decade or so, the legal and economic literature has given increased attention to the efficiency-enhancing properties of vertical restraints and their effect upon competition. A central reason given by the Supreme Court in *GTE-Sylvania* for changing the legal rule for non-price vertical restraints from per se illegal to a rule of reason standard was that the "great weight of scholarly opinion has been critical" of the per se illegality stricture. 433 U.S. at 47-48. In addition, Justice White's concurring opinion in *GTE-Sylvania* observed that the economic reasoning upon which the Court majority relied to defend rule of reason treatment for non-price restraints could have been invoked to dissolve the per se ban against vertical price restraints, as well. 433 U.S. at 69-70.

A similar evolution of contemporary scholarly analysis could supply the foundation for the High Court to adopt a less-stringent rule for RPM. A substantial part of the commentary on vertical price restraints has questioned the value of continuing an unqualified ban on all uses of RPM. See, e.g., Meehan & Larner, "A Proposed Rule of Reason for Vertical Restraints on Competition," 26 Antitrust Bull. 195 (1981); Posner, "The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality," 48 U. Chi L. Rev. 6 (1981); Williamson, "Assessing Vertical Market Restrictions: Antitrust Ramifications of the Transaction Cost Approval," 127 U. Pa. L. Rev. 953 (1979). Should it choose to do so, the Court could employ this developing line of commentary as the intellectual ground for modifying the per se standard of illegality for RPM.

Question. Do you agree that your enforcement of resale price maintenance has diminished substantially?

Answer. Like its predecessors the current Commission is committed to enforcing the existing legal rules proscribing resale price maintenance (RPM). At the same time, however, the Commission is determined to exercise greater care to see that its investigations, complaints, and consent agreements in this and other areas improve consumer welfare.

The basis for this greater caution is twofold. First, Congress established the agency in the expectation that its enforcement choices would flow from a superior ability to digest and apply state-of-the-art learning in law and economics. The Commission's comparative advantage as a law enforcement body in the antitrust field rests substantially upon its capacity to employ a sophisticated understanding of law and economics to identify practices which were likely to injure consumers.

The second reason is closely related to the first. As I indicated in my answer to question 2 above, a large body of respected modern scholarship has taken serious issue with law enforcement techniques that consist of little else than a mechanical application of the per se ban against RPM. The outcome of the more careful and detailed inquiry which this commentary advocates may be a smaller absolute number of formal enforcement proceedings. Nonetheless, the Commission will be far more confident that the complaints, consent agreements, and litigated orders it approves will improve consumer well-being.

Question. In your opinion, is there any justification whatsoever for a manufacturer setting and enforcing a minimum sales price for its goods?

Answer. There appear to be several circumstances in which a manufacturer's use of resale price maintenance could have efficiency-enhancing, procompetitive effects. First, for certain categories of products, RPM may be the best means for inducing retailers to provide point-of-sale services desired by manufacturers and consumers. RPM can help eliminate the free-riding which occurs when a retailer seeks to gain business by foregoing services supplied by other dealers and uses the resulting cost advantage to lower its prices.

Second, a new entrant may find RPM a valuable tool for persuading dealers to carry its product. By ensuring an attractive margin, RPM may enable the entrant to overcome the dealers' reluctance to carry and promote a new or unproven product.

Third, the benefits derived by consumers from purchasing and using certain products may be enhanced by the existence of a widespread dealer network. Manufacturers may find RPM and other vertical restraints useful in maintaining an economically viable widespread network of dealers. In such circumstances manufacturer-imposed RPM may enhance the attractiveness of its product and enable it to compete more vigorously.

A characteristic of markets reflecting these incentives for vertical restraints may be the existence of substantial vertical integration by other competitors in the market. The smaller, less completely vertically integrated manufacturer may be attempting to achieve vertical efficiency via contracts (restraints), rather than through legal vertical integration. Handicapping typically smaller manufacturers by denying them on a *per se* basis these efficiencies is neither fair nor procompetitive.

Question. Should injury to business competitors or injury to the marketplace by a deceptive ad be examined by the FTC?

Answer. The definition of deception that Chairman Miller has proposed implicitly addresses the injury to competition that deceptive representations can generate. Under that definition, a claim would be deceptive if consumers, acting reasonably in the circumstances, are likely to rely upon it to their detriment.[1] A materially deceptive representation affects the purchase decisions of consumers, and therefore unjustifiably diverts business from competing firms to the firm making the representation. In short, materially deceptive representations injure competition as well as consumers. Of course, diverting business from one's rivals is the essence of both legitimate and illegitimate competitive strategy. The key issue is therefore not whether competitors are injured by a given representation, but whether a given misrepresentation is material to consumers, and therefore likely to injure competition as a whole.

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[1] A claim would also be deceptive if its purveyer knew or should have known that it was misleading; in these circumstances, a showing of consumer injury would not be required.

Question. What effect will defining "deception" have on the ad substantiation program if the current restrictions on "unfairness" jurisdiction over commercial advertising are continued?

Answer. At present, Section 18(i) of the FTC Act, 15 U.S.C. § 57a(i), prohibits the Commission from promulgating any rule to the effect that children's advertising constitutes an unfair act or practice. To the best of my knowledge, that is the only statutory provision that presently affects Commission authority to address unfair acts or practices. In any event, the definition of deception that Chairman Miller has proposed would not affect Commission authority to continue the ad substantiation program. If an advertiser misrepresents—explicitly or implicitly—the existence or significance of evidence to support a given claim, the Commission can treat the representation as deceptive and require substantiation.

Of course, in any advertising substantiation case, one key issue is whether the advertisement at issue actually makes any claims—and, in particular, any implied claims—that require substantiation. The proposed definition of deceptions would resolve this problem to a large degree. It would ensure that the Commission requires substantiation only for express or implied claims that reasonable consumers would actually perceive in advertising.

Question. In your opinion, would setting standards concerning deceptive practices minimize uncertainty?

Answer. Developing a more specific deception standard would certainly reduce current uncertainty—both within the business community and within the judicial system—as to the criteria the Commission will use to identify and analyze deceptive practices. As a corollary, it would provide the Commission staff with greater guidance as to the minimum standards that should be satisfied before instituting a preliminary investigation. As I noted in testimony before the Senate Commerce Committee, the mere initiation of a preliminary investigation by the Commission staff may in itself discourage the dissemination of information that is both truthful and useful to consumers. Moreover, once an investigation reaches the complaint stage, it becomes public. A firm seeking in good faith to advertise truthfully might therefore feel compelled to settle earlier—regardless of the merits of the issue—in order to avoid the injury to its reputation that the issuance of a public complaint would cause.

Question. How would defining "deception" affect the FTC's authority over statements which are deceptive by omission?

Answer. Defining deception would affect the FTC's authority over statements which are deceptive by omission in the same way it would affect affirmative misrepresentations. In general, it would be deceptive to fail to disclose information if consumers, acting reasonably under the circumstances, would be likely to be misled and injured by an affirmative statement omitting the information in question.

Question. What effect would Chairman Miller's proposal have on deceptive practices (other than advertising) challenged by the Commission?

Answer. The definition of deception would require the same showing by the Commission whether the allegedly deceptive statement was in an advertisement or elsewhere.

Question. Would you oppose an extension (for the life of the authorization) of the 1980 Act's agricultural cooperative provision?

Answer. As I understand the legislative intent and subsequent judicial interpretation of the Capper-Volstead Act, the underlying purpose of that Act is to allow farmers to form agricultural cooperatives and engage in business activities and associations with the same legal footing as that enjoyed by any other businessmen in forming corporations, but that the law does not confer upon agricultural cooperatives any competitive advantages not similarly enjoyed by other corporate entities.

I seriously question the necessity of maintaining that portion of the agricultural cooperative provision that directs the Commission not to conduct any studies of agricultural marketing orders. I can perceive the possibility that extension of such a provision could inhibit public review in situations where there is evidence that suggests that anticompetitive activity is being carried out under the cloak of the marketing order exemption or where there is evidence of marketing order activities going beyond those practices legitimatized by Congress and the courts and which are being used for anticompetitive purposes.

Question. Would you object to a permanent position for a legislative veto?

Answer. I believe that the existence of a legislative veto is beneficial and needed for two reasons:

First, it is well to remember that the Federal Trade Commission, comprised as it is of five unelected Commissioners, can, pursuant to its rulemaking authority, promulgate trade regulations carrying all the weight of the law, and that even the elected members of Congress are subject to executive veto in their lawmaking activities. A legislative veto over the Commission's rulemaking authority would thus appear to be justified on the grounds that it better allows for the will of the people to be considered before rules are finally promulgated.

Second, the existence of a legislative veto may well serve to facilitate the Commission's deliberative process. By providing an assurance of review by Congress of the proposed rule, interested parties may be dissuaded from politicizing the deliberations by the Commission.

Question. Do you believe the FTC has systematically misapplied the deception doctrine?

Answer. I do not believe the FTC has systematically misapplied a deception doctrine. My concern is rather that the current definition of a deceptive act or practice—to the extent that it exists at all—is too imprecise and subjective. As a result, the Commission has not systematically analyzed deception issues in its cases, particularly over the last few years. The uncertainty that this subjective approach creates can be expected to make firms reluctant to advertise the material attributes of their products—information which is very important to informed consumer choice—and instead to stress puffery and image enhancement, which are of dubious value to consumers. Some commentators have suggested that the latter kind of advertising creates "spurious" product differentiation barriers to entry, and hence weakens competition. The paradox of current FTC policy is that it encourages firms to disseminate precisely that kind of advertising.

Question. You mention in your testimony an example of an action by the FTC—a preliminary inquiry—that may have caused significant injury to consumers—a Volkswagen commercial stressing the virtue of VW's safety belt system. Without knowing the details I note that GM is running a number of ads on the safety of their automobiles, and that the FTC's inquiry does not appear to have "chilled" those ads. How would enactment of the deception standards you proposed have affected the FTC's preliminary inquiry into whether or not the ad might be misleading?

Answer. The Volkswagen commercial I discussed in my testimony differs in important respects from the General Motors advertisements referred to in the question. First, the General Motors advertisements for the most part deal with the company's overall efforts to improve the safety of its vehicles. The television spots, for example, portray GM's safety research program and its safety testing techniques and thus pose no claims requiring substantiation. By contrast, the Volkswagen commercial promoted a specific safety feature of a particular model. Although the GM and Volkswagen advertisements each convey useful information, I regard the Volkswagen commercial as the more important endeavor because it sought to provide the type of more detailed, product-related information which is likely to be more valuable to consumers.

Second, the GM commercials which did attempt to supply more specific safety information for particular models were print advertisements. The print medium, of course, permits the advertiser to explain and qualify its claims in much greater detail than a 30- or 60-second television commercial. The relevant consideration in the example I used before the Committee is the set of constraints the Commission would impose on an automobile manufacturer seeking to use television, with its potential for broader exposure, to make safety claims about specific features of its various models. In light of the two distinctions I have outlined here, I would dispute the factual predicate of the question—namely, that the existence of the GM advertisements demonstrate that the product-specific safety claims to which I referred in my testimony have not been chilled by the Commission's preliminary inquiry of Volkswagen.

The enactment of a deception standard along the lines I have proposed would reduce errant inquiries by focusing the attention of the Commission's attorneys and economists upon instances of genuine consumer injury. The establishment of reasonableness and materiality criteria would foster a more predictable, less subjective approach to analyzing advertising claims. In addition, the standard would provide useful guidance to businessmen attempting to determine what kinds of claims will be acceptable.

QUESTIONS OF SENATOR LAUTENBERG AND THE ANSWERS THERETO

Question. Several members of Congress have expressed their concern about Chairman Miller's professed intention to exercise his "prosecutorial discretion" in enforcing the antitrust law governing resale price maintenance. In particular, many members from New Jersey have inquired about the status of the Commission's response to complaints by the Burlington Coat Factory, a clothing retailer, that it has been the victim of illegal resale price maintenance. In light of this Congressional concern, would the members of the Commission, individually or jointly, set forth publicly, and in clear detail, the standards it intends to apply in determining whether, in a given case, it is in the public interest to enforce the law prohibiting resale price maintenance?

Answer. With resale price maintenance (RPM) and any other business practice falling under the Commission's antitrust scrutiny, the principal standard I apply is whether the behavior at hand increases or diminishes consumer welfare. I believe the public interest compels the Commission to enforce the law against RPM in instances in which the use of RMP injures consumers. Such injury, and anticompetitive effect, can be substantial if the purpose and effect of the restraint is to foreclose competition in style and type of retail distribution, preserving inefficient and costly distributive practices. This determination, in turn, requires an assessment of the probable economic impact of RPM in the market under review. The Commission's Bureaus of Competition and Economics are now conducting a careful study of the vertical restraints area, including RPM. A major aim of this study—which encompasses, among other things, an analysis of the legal and economic literature and the Commission's own enforcement experience—is to develop case selection guidelines and enforcement criteria for RPM.

Question. Would the Commission also furnish statistics for each of the last 5 full years, plus the year to date, on the following:

The number of cases subject to a so-called "100 hour investigation" or preliminary investigations in which resale price maintenance was alleged;

The number of cases subject to a formal investigation in which resale price maintenance was alleged;

The number of complaint recommendations tendered by Bureau of Competition staff to the Commission in which resale price maintenance was alleged;

The number of complaints issued by the Commission in which resale price maintenance was alleged; and

The number of consent agreements entered involving resale price maintenance.

Answer. See response by Chairman Miller.

The CHAIRMAN. We follow a first-come-first-served rule on questions, so we will go in the following order: Senators Packwood, Ford, Gorton, and Danforth. And please hold on our first round to 5 minutes.

Let me go through some of the major issues and make sure the record is clear where the Commission stands. On the exemption of professionals, the Commission is unanimous in opposition. Is that correct?

[All nod in the affirmative.]

The CHAIRMAN. There may be some slight deviation about the Broyhill-Dingell compromise provision, but on exemption there is clearly no problem?

[All nod in the affirmative.]

The CHAIRMAN. The record will show they have all nodded "yes." They are unanimous.

On an exemption for advertising, the Commission is unanimous in opposing the exemption for advertising?

Mr. MILLER. We are unanimous.

The CHAIRMAN. On the agricultural co-op provision, the Commission is unanimously opposed?

Mr. **Miller**. We are unanimous.

The **Chairman**. On the codifying of unfairness, the Commission is 4 to 1 for codifying it, with Commissioner Pertschuk dissenting. Is that correct?

Mr. **Pertschuk**. That is correct, Mr. Chairman. Although I would note that I believe the definition is a good one, I just do not see the necessity for codifying it.

The **Chairman**. I understand.

And on codifying deception, the Chairman and Commissioner Douglas want to codify, the other three do not. Am I correct on that?

Mr. **Miller**. That is correct.

The **Chairman**. I just wanted to get those on the record, because those are the major issues we are facing. Now, let us go to the co-ops.

I will ask Chairman Miller this question: In your estimation, what should be the Federal Trade Commission's enforcement role with respect to agricultural cooperatives, and should the FTC have the authority to study marketing orders?

Mr. **Miller**. Mr. Chairman, I think the FTC should have the authority to study marketing orders, as any other commercial aspect of business, and in a relationship between Government and business. Section 6 of the Federal Trade Commission Act in fact calls for the Federal Trade Commission to be involved in such studies.

With respect to the agricultural co-op matter, we recognize, of course, that Capper-Volstead provides a limited antitrust exemption for agricultural co-ops. But there are a lot of commercial activities engaged in by ag co-ops that are not immunized by Capper-Volstead.

It is important for us to be able to look at those. An admonition such as contained in the 1980 Improvements Act leads us to be very careful about the possibility that our activities might overstep the bounds of Capper-Volstead and it is quite appropriate, but I would not want it to go beyond that.

The **Chairman**. Let me assure you, as far as this committee is concerned, I do not want you stepping beyond your legal authority. The law is the law, and whether you and I like it, it is to be enforced. But, so long as activities of co-ops are not specifically protected or excluded by Capper-Volstead, then the Federal Trade Commission or other departments of Government ought to have a right to pursue whatever remedies are necessary.

Mr. **Miller**. Yes, sir. I believe all the Commissioners would agree with that.

The **Chairman**. I will not get into the history of co-ops, but my hunch is that at the time of the passage of the Capper-Volstead Act, relatively few people envisioned what co-ops would become. They were initially little co-ops owned by little farmers, and there are still some co-ops like that around, but a great many co-ops today could easily go head to head with some of the best stockholding companies that exist in this country. Many in fact do go head to head with them, and in many cases beat them.

This is no longer a question of the little farmer spending his Friday afternoons or Friday nights attending a meeting of the co-op and passing on major issues of policy.

Now, Mr. Chairman, let me ask you about advertising and unfairness. If we exempt advertising from the FTC's unfairness jurisdiction, do you think it would be more difficult for the FTC to require the substantiation of advertising claims and to prohibit ads that depict children engaged in unsafe behavior?

Mr. **Miller**. It would be more difficult for the Commission to remedy that problem if advertising were exempt.

The **Chairman**. Let me ask you this. If advertising is exempt from unfairness jurisdiction, would you then suggest changing your statutory definition of deception?

Mr. **Miller**. That is a difficult choice for me to address, Senator. Let me think on that. I will get back to you about that, sir.

The **Chairman**. Commissioner Pertschuk, why are you opposed to the codifying of the definition of unfairness, so long as you say you agree with all of the guidelines that the Commission has already put forth?

Mr. **Pertschuk**. The basic reason for opposition is an inate conservatism, Mr. Chairman.

The **Chairman**. Inate what?

Will the record please put that in caps?

Mr. **Pertschuk**. Essentially the standard of course has stood since 1938. I know of no cases of abuse where the Commission actually brought a case or issued a rule which was the subject of substantial criticism, that is a final rule or case. The Commission did, in the interests of giving guidance to the business community, develop the definition that is before you. I think it is a good one, but I have two objections to putting it into the law.

One is that the very purpose of introducing unfairness into the law to begin with was because of Congress recognition that it could not anticipate the kinds of exploitative, unconscionable activities which could occur in the business community and any definition will not be able to anticipate future developments.

The second reason is that once you put a definition into the law—and this is essentially part of the objection to the deception definition—you hand to the lawyers a new tool, or a new set of tools, to argue that in run-of-the-mill cases that Congress obviously meant for the Commission to bear new burdens of proof, so there is a risk.

The **Chairman**. Senator Ford?

Senator Ford: Thank you, Mr. Chairman.

Chairman Miller, let me ask you just two or three administrative questions here, and probably take our 5 minutes.

Since you have arrived at the Federal Trade Commission, how many new administrative complaints or consents where your staff did the preliminary work have been issued in the areas, say, of resale price maintenance?

Mr. **Miller**. In resale price maintenance, since October 5, 1981 when I came to the Commission, we have opened 13 initial phase investigations of RPM's specifically. We have closed six, and we have opened one full-phase investigation.

Mr. **Ford**. Is it true that a resale price maintenance consent order that was entered by your Boston regional staff has been sitting in your office since you came on board as Chairman in December 1981?

Mr. MILLER. I am aware that there is a controversial consent order that has been worked on by the Boston regional office and by the staff at headquarters, but it has not been resolved.

Mr. FORD. What discretion does the FTC have to enforce, or refuse to enforce, the rule of law that resale price maintenance is per se illegal?

Mr. MILLER. That is a very complicated question, Senator. The Federal Trade Commission unlike, say, the Department of Justice, has a public interest standard in bringing a complaint, that is contained in section 5(b) of the act.

As you probably know, the courts have been changing the interpretation of the law for the last several years. The landmark case was, of course, the *Sylvania* decision. Also, the empirical evidence and the writings of law professors and economics professors have pointed out that it is very important that resale price maintenance in certain instances can be very procompetitive.

If a very small firm, for example, is trying to enter the market where there is a need for point-of-sale service, one way the firm may enter is by practicing RPM. While that certainly reduces the intrabrand competition, the effects of the increase in interbrand competition may result in an increase in competition. So the public interest standard contained in section 5 seems to me to require that we make a determination that our bringing such a case would increase competition or, to put it another way, I fail to see how our bringing a case that would reduce competition would be in the public interest.

As you probably know, the Supreme Court has recently granted cert in the *Monsanto* case that involves some vertical price arrangements. Most of the cases, or the vast majority of the cases coming before the Commission that are labelled RPM include some nonprice aspects as well.

The Supreme Court has said view those nonprice aspects on a rule-of-reason basis. The Supreme Court, in Dr. Miles, going back to 1911, said RPM is a per se violation. So the case law and the Supreme Court law in this area are in a state of turmoil.

Mr. FORD. Regardless of what the commentators say, the law is law, is it not?

Mr. MILLER. The law is the law, and I say that it is in a state of turmoil and confusion right now. That is my judgment.

Mr. FORD. We heard testimony at the July hearing on deception that the FTC's deception powers are both well-established in case law and well-understood by the advertising community. Is there really any need for Congress to tamper with the statutory definition of "deception"? Will we create more uncertainty by doing so?

I have listened to Mr. Pertschuk say that it gives attorneys another tool.

Mr. MILLER. Senator Ford, I would say this. I do not believe that it would increase uncertainty. I believe it would diminish uncertainty.

The fact of the matter is that the Commission has very little guidance right now. I think the fact that an agency can act in many different ways creates a lot more uncertainty than would be created by the Congress giving it some specific guidelines.

The CHAIRMAN. Senator Gorton?

Senator GORTON. Mr. Pertschuk—and I would be happy to have a comment on this question from any of the rest of you as well—it seems to me, from listening to and reading your testimony, we have more than a dozen controversial issues. I would include some of the issues on which the five of you are unanimous. Quite obviously, we have a lot of subjects and a lot of questions to consider. Of all the critiques, Mike, which you have in your testimony as to proposed changes in the present law, why do you not tell me the two or three or four most important in the order of their importance in your view?

Mr. PERTSCHUK. Interestingly enough, I think I would agree principally with the chairman on that ranking; that is, the most important issues, from my perspective, are the exemption of the professions—that is a major area of important Commission work; second, the exemption of advertising unfairness.

I would take George's oath to do no harm, and ask that a third would be not to tamper with the definition of "deception."

Senator GORTON. You would rank them in that order rather than the other way around?

Mr. PERTSCHUK. Yes, sir.

Senator GORTON. Are any of the rest of you willing to make a comment on that, or to add another top issue to those that Mike has outlined?

Mr. MILLER. Senator Gorton, I think I would rank them at least—No. 1 would be the professions, but I think I would put all of the exemptions in one category. Second, to define unfairness; and third, to define deception, if not by the Congress, by the Commission itself.

Senator GORTON. Mike, I am going to come back to you again, but I would like comments from all of you. At what point, in dealing with these issues do we cross the line between having a constructive reauthorization bill, as against a bill which should be resisted in the way that the chairman and I did in connection with the 1982 bill?

Mr. PERTSCHUK. I know this is bad form, Senator, but the House committee—although we did not agree with everything—did a damn good job last time of threading through the claims, although I think the Commission would have some differences about the specific provisions. But, by and large, the bill that came out, plus the Dingell-Broyhill compromise on the professions, was pretty good.

Senator GORTON. In other words, it would have been a clear step forward to pass the reauthorization bill in that form?

Mr. PERTSCHUK. I believe so.

Ms. BAILEY. Senator, may I also comment on that?

Senator GORTON. Sure.

Ms. BAILEY. I agree with the comment about the House bill, and it would have been a step forward to have passed the bill in that form. On the other hand, if I understood your question specifically it had to do with something the chairman said in his opening remarks.

Do you mean we cross the line and then have to settle for no authorization?

Senator GORTON. Yes.

I assume that most of you would have preferred what actually happened last fall, that the Senate did not report the bill reported out by this committee.

Mr. PERTSCHUK. Amen.

Ms. BAILEY. I think that is correct.

Senator GORTON. So the line is somewhere between the original House bill and the Senate bill?

Mr. PERTSCHUK. No, I would say the line is the House bill. Anything worse than the House bill, it is better to go on with what we had before, in my judgment.

Senator GORTON: I yield back the balance of my time and go to a new subject.

The CHAIRMAN. Senator Danforth?

Senator DANFORTH. In just listening to the testimony of both of you, it would be interesting to check the transcript and count up the number of times that the first person singular was used versus the number of times that the first person plural was used. I think it is a matter of common knowlege and conversation that there have been wide discrepancies within the Commission.

I do not know if these were on ideology or application of ideology or whether there were personal conflicts and confrontations entering into it, but clearly we have a five-member Commission—fortunately five, not four—and not a one-member Commission, and that means that you all are hired to have your own input and to express your own point of view. I suppose we now live in an era where every variation of opinion within any particular agency or commission immediately becomes a matter not only of front page news but of charge and countercharge against one another.

However, the operation of an effective administrative agency and the winning of support and confidence in what that agency does depends to a very large extent on the agency being able to function together, and to function as a unit and to function with maybe not total agreement but at least with an effort to work out common policies. I notice the Chairman's testimony begins emphasizing the points in common that are held in the Commission.

I do not know whether this is as much a question as a comment, but I will put it to you as a question. Do you feel that the Federal Trade Commission is working as a unit? Is there mutual respect and an effort to work out common policies and come to consensus positions or, in the alternative, do you view yourselves as individuals fighting tooth and nail with one another for your own positions and your own turf? Are you a smooth working unit or are you playing a kind of game of rollerball over at the FTC?

Mr. MILLER. Well, we need some diversion from time to time, Senator Danforth, from the heady experience of making all of these decisions.

Let me draw a distinction. We are not an administration such as a President with a Cabinet, where a President hears all the differing views and makes a decision and then everyone marches lockstep to that view. I think it would be a mistake for the Commissioners to feel that we can express our judgments only when we have met together and have agreed on a particular policy and then all express the same policy. That I do not believe is the reason the Commission was established.

I do not believe that is the appropriate role for a Commissioner. A Commissioner is appointed by the President and confirmed by the Senate to exercise independent judgment. There is no question that we have five people at the Federal Trade Commission who have very strong feelings about matters, and who are very articulate in expressing their views, and I think that is quite helpful. I do not think there is any surprise about the fact that the diversity of views reflects the strongly held conviction that one view or one way or one mode of operation in the Commission or one approach is more acceptable than others.

I would point out something that might be a little bit of a surprise to you. If you went back and looked at all the votes that we cast, I dare say that we have agreed unanimously on 96 or 97 percent of the votes we have cast.

I think it is unfortunate that any sort of—as you pointed out, Senator—any sign of disagreement is blown out of proportion.

Senator **Danforth**. Mike?

Mr. **Pertschuk**. I just wanted to agree. There are strong issues of principle and philosophy, but they are basically not personal. The Commission on a number of issues has been able to work together very well. I only want to add that one issue in which there was substantial concern and tension was the issue of advertising substantiation.

I think it is a credit to Chairman Miller and his staff that we were able to work toward a Commission statement that the Commission voted out unanimously last week basically reaffirming the commitment to add substantiation, and that was a cooperative venture that I think was to everyone's benefit.

The **Chairman**. Senator Lautenberg.

Senator **Lautenberg**. Thank you, Senator. I am pleased to be here. For many, this is old hat. For me, it is an opportunity to learn more about the FTC and the proposals afoot to amend its powers. I want to set forth for the record certain principles that I bring to the issue, including a belief in the competitive marketplace.

I prospered abundantly from that marketplace, and I believe that the entrepreneur should be nurtured, so should the risk-takers, the dreamers, the inventors. We need Government agencies to insure that the entrepreneur has a means to elbow his way into the market, to offer his ideas, sell his product.

We need effective antitrust enforcement.

We also know that no market is perfect, and consumers must be protected. Products are more complex. Reasonable, fair regulation is necessary to stop deceipt and unfairness. The FTC, we know, is not the Consumer Protection Agency. Consumers are not the only ones who need protection. The honest businessman and budding entrepreneur need to be assured that they can compete fairly with their competitors.

With those principles in mind, I look forward to this examination to see how we can be assured that the appropriate mission of the FTC is accomplished.

Mr. Miller, you are obviously dissatisfied with the broad discretion that you and your fellow Commissioners enjoy. Perhaps "enjoy" is the wrong word. But there seem to be aspects of your discretion that you want to retain. I would like to discuss in particular your views about resale price maintenance and the exercise of your prosecutorial discretion. You seem intent on picking and choosing among those cases to prosecute. Am I correct?

Mr. MILLER. Well, any enforcement agency has to make those kinds of choices. Prosecutorial discretion is a fact of life, and I think it is incumbent upon us to put those resources where we can make the biggest difference for consumers and honest business people alike.

It is also, as I discussed with Senator Ford, a matter where the Federal Trade Commission has in section 5, according to my reading, an obligation to ascertain that it is in the public interest to bring such a case, and this is a hurdle that should not just be winked at. I think it is one Congress intended for us to take very seriously.

Senator LAUTENBERG. Resale price maintenance is considered illegal is it not?

Mr. MILLER. Well, as I was indicating, the courts have given conflicting signals of late. The landmark *Sylvania* case held that vertical nonprice arrangements should be judged on a rule of reason. This means that in certain circumstances they would be lawful; in certain circumstances they would be unlawful.

The Supreme Court has granted cert in a case which involves issues of vertical price arrangement, something akin to RPM, where presumably they will be making a ruling in this regard. Before the *Sylvania* case, vertical nonprice arrangements were also unlawful.

Most of the cases that we have involve some of each, where the Supreme Court says one part you judge on a rule of reason, and another part, going back to the *Dr. Miles* decision, is per se unlawful. So the law is confusing and convoluted in this matter.

Senator LAUTENBERG. Am I perhaps missing something that would be apparent to an attorney? In proposing a standard or a definition of deception, you defer largely to the standard set forth in the restatement of contracts and the restatement of torts. As I understand it, those statements are simply attempts by legal scholars to crystallize the hundreds of separate rulings by judges as to what deception is. The common law is judge-made law, and it changes as judges perceive different needs in society.

We see it in the evolution of product liability law. We see it in the evolution of law governing domestic relations. If we imported into the statute the restatement standard, are we not simply replacing the ad hoc judgments of the FTC, as you would call them, with the ad hoc judgments of our common law judges?

Mr. MILLER. I do not really think so, Senator. I have articulated the proposed standard that I recommend. What I am saying is, it is not something just pulled out of the blue. It is very consistent with common law principles that have been set down over time. I think, frankly, it is more important that Congress enunciate the guideline than the specifics. I have more concern about the principle of enunciating the guideline than I have over the specifics of what that definition is.

Senator LAUTENBERG. Thank you, Mr. Chairman.

The CHAIRMAN. Mike and Pat, let me ask you what you think about the proposals—and the other Commissioners may comment if they want—put forth by the AMA and the professional engineers last week that in addition to competition you consider such factors as quality of care and public welfare in your antitrust cases.

Mr. PERTSCHUK. Mr. Chairman, I think that opens up an area of mischief. The court in the *Professional Engineers* case basically addressed this issue. As you know, in that case the engineers argued that price competition essentially inherently posed a threat to public health and welfare by degrading the level of quality of engineering skills and encouraging unsafe performance.

The court said that Congress has spoken on the issue of competition as the law of the land, and that for a private organization to set forward its own vision of the public welfare as opposed to competition was not something that the courts ought to take into consideration.

Remember that in any State, under the State action doctrine, or Congress, can make the judgment that competition in the particular area of behavior should be suppressed on behalf of other values. But for the Commission to be called upon to balance without any guidance the congressional mandate in favor of competition against asserted public interest values seems to me to be mischief and, indeed, a delegation of the Commission which would not be in the public interest.

Ms. BAILEY. I agree with that basically. My feeling is that to try to incorporate that kind of defense into the FTC Act would undermine the basic policy of the antitrust laws, the Sherman Act and others. The Supreme Court has consistently and firmly refused to do that.

What they actually said in the *Engineers* case is that the rule of reason does not support a defense based upon the assumption that competition itself is unreasonable, which is what we would be asked to weigh in a situation like this.

It would require the Commission and judges to accept arguments that anticompetitive conduct by private conspirators was intended to promote quality of care and to try to balance that off.

The CHAIRMAN. In fact, that argument is going to be raised most of the time. My hunch would be that not many antitrust cases are out-and-out criminally deliberate defraud-the-consumer cases. They are undertaken by well-intentioned people who are so close to the forest they do not see the trees and think that what they are doing is good for the public because they see the public as themselves.

Ms. BAILEY. I think that is correct and that argument has been made not just by doctors but by industry after industry in the past and no doubt will be made in the future—that their private concept of what is good for the public should be supreme to the judgment of the Congress in the competition area as to what their market ought to look like.

That is a question we may go over and over with. But on the quality of care the Commission—and we could pull out all our papers and it would be perfectly clear—that the Commission pays very close attention in the early process of investigating the matter to decide whether a case should be pursued in the health care area to any and all quality of care questions or defenses or reasons that the industry wishes to give or would give or would argue for what it is doing, and we investigate those very carefully to be sure—we do studies if necessary as we did in the eyeglasses area—that any action that we take would not diminish the quality of care.

But once a case is brought, the issues are then the competitive effects, the anticompetitive effects, the pro-competitive effects, and not other extraneous issues as the Supreme Court has directed.

The CHAIRMAN. Do other Commissioners want to comment?

Mr. CLANTON. Mr. Chairman, let me make one further observation on that point. I think the difficulty we have with that concept is that it is so open-ended; it is not limited to situations where quality of care has competitive benefits. It is appropriate to take account of quality of care arguments, but in the context of whether it promotes a pro-competitive goal. The practice may make the competitive structure, of a market more efficient.

I will point to one example—the *AMA* case in advertising. The AMA's total ban on advertising was, according to their own justifications, really done to prevent deception. We argued that the ban went far beyond what was necessary to achieve a legitimate goal—that is, to prevent fraud and deception of health care patients.

Now in the area of deception, it arguably is a quality of care argument, but in fact it is also a competitive argument because deception has the effect of confusing consumers, making it more difficult for the market to function effectively.

So the problem we have is with a generalized quality of care argument—an argument that does not properly distinguish those practices that are really directed toward improving the competitive process.

We have heard in cases, for example, that compensation is inadequate and because it is inadequate it will harm the delivery of health care. We had that argument raised in a related form raised in a recent case involving the Michigan State Medical Society, where the society was concerned about reimbursement levels or the manner—not really the level but the manner—in which the reimbursement policy of Michigan Blue Cross-Blue Shield was established.

The society's concern was that the reimbursement level was not fair to physicians in one part of the State versus another, not updated frequently enough to take account of increases in costs. You might argue that in the abstract sense that has an impact, let's say, if levels were too low, in hindering the ability of doctors to get an adequate return. You might also then stretch that further to make an argument that this could affect quality of care by providing less of an incentive for physicians to do a good job.

But it seems to me that is a tangential argument and exactly what the Supreme Court in many cases has said should not be done in terms of trying to analyze whether price-fixing, for example, is reasonable. This is the real point and distinction. It is not that quality of care may not have some pro-competitive benefits, but that a broad undifferentiated justification or defense is not really useful.

The CHAIRMAN. Mr. Chairman, do you or Mr. Douglas want to comment?

Mr. Miller. Well, I, without necessarily endorsing each statement made, I agree with the position expressed.

Mr. Douglas. I have nothing to add.

The Chairman. Senator Ford?

Senator Ford. Chairman Miller, if deceptive acts or practices are not defined, would you support a provision to support unfairness as a basis for rulemaking in the commercial advertising areas, which would be section 18?

Mr. Miller. For rulemaking?

Senator Ford. Yes.

Mr. Miller. That is a tough question. It is a very tough question. I certainly have more sympathy if deception is not defined.

The Chairman. I did not hear you.

Mr. Miller. More sympathy if deception is not defined. But let me get back to you on that. Let me think on that. It is a complicated matter. It is kind of interesting. It is like somebody saying we have got a barrel full of rotten apples, which one do you want to eat. I think it is tough to make those choices.

Senator Ford. A lot of people, as hungry as they are today, would not be choosy.

You note in your testimony that a majority of the Commissioners do not object to the concept of a cap on civil penalties. Do you have any judgment on what that cap should be?

Mr. Miller. It seems to me $1 million sounds reasonable. It is about right. It leaves the Commission with a considerable amount of flexibility to impose civil penalties but is not so limited that it creates undue uncertainty. It is true that in the most celebrated case, in the *Reader's Digest* case, the court made the determination of the appropriate penalty, but it was the court's determination after the Commission had argued very strongly certain amounts.

Senator Ford. What is your criteria for intervening in other agency programs, given the tight budget that you have.

But does FTC intervention contribute to the process if the other agency is well staffed by free market economists and headed by a deregulator?

Mr. Miller. Well, I think it does in many areas. For one thing, Senator, in a number of specific agencies the FTC's cooperation is mandated by law.

Chairman Packwood headed the ratemaking study commission and in that our participation was mentioned in the law. I could give you a list, but there are a very considerable number of instances where we are required to cooperate with agencies in providing input and an expertise.

Beyond that, consistent with the policy the Commission has had for a very long period of time, it was given particular emphasis under Chairman Lou Engman and carried on by his successors—Cal Collier and Mike Pertschuk and David Clanton—and the Commission as a whole during that period of time.

Intervening before other agencies can have rather significant positive impact in protecting consumers and in encouraging agencies to rely on competitive means and competition and to prevent them from restraining competition.

Senator **Ford**. Since we are getting close to the vote I may not have an opportunity to come back. I want to move into a field very quickly and have one or two questions.

What efforts is the FTC making to review the potential anticompetitive effects of the proposed General Motors-Toyota joint manufacturing agreement?

Mr. **Miller**. We have one of our divisions in the Bureau of Competition which is looking at that very, very carefully. We have had a Commission meeting to discuss the plan for the review by the Commission staff and an intensive investigation is under way.

We would be glad to supply you with more details on this matter.

Senator **Ford**. Let me ask you. Is the Commission going to make a quick decision on this one? Is it going to be a matter of days or do you think it will be an extensive period of time?

Mr. **Miller**. It will not be in a matter of days or in a matter of just a few weeks. It will be a longer time frame. For one thing, we do not have the final documents to review. There have been various announcements about the announcement, but we do not have the final documents to review.

Senator **Ford**. You are getting just public relations announcements and not the basic contract?

Mr. **Miller**. We have some documents that give us a great deal of details, but we do not have the final version for us to review at the present time.

Ms. **Bailey**. I would just like to add to what the chairman has said. There has been a great deal in the press which would indicate that an operating agreement has actually been reached, and to the best of our knowledge that is not quite correct.

They have a memorandum of understanding. There are some details in it, but we have not yet even reached the place where it is clear that they would have to file under Hart-Scott-Rodino, so that in fact we have very few materials to work with as yet. So an early decision would seem to be out of the question.

Senator **Ford**. Let me ask you, then, do the FTC merger guidelines apply to this venture?

Mr. **Miller** It is a joint venture, not a merger.

Senator **Ford**. That is what I said, a merger guideline applied to the joint venture.

Mr. **Miller**. The principles articulated in that statement will guide us in some of our analysis, but if it were a proposed merger and we found such a merger unlawful, under the guidelines it would not necessarily mean we would find disagreement with it.

Senator **Ford**. It bothers me somewhat and I do not have a legal background, but I am beginning to study it some. Some high-priced fellows have been working on this one.

Mr. **Miller**. I agree.

Senator **Ford**. You take the first and second largest auto manufacturers in the world. They work together and they make the price of automobiles. I guess they are pricemaking worldwide, almost, and I think it is a very interesting opportunity to exercise the FTC's jurisdiction here, and I would hope you would not do it overnight.

Mr. **Miller**. Oh, we surely would not.

The **Chairman**. Senator Gorton.

Senator GORTON. Mr. Miller, according to some AMA testimony I have heard, you are currently engaged in negotiations with AMA in an effort to work out some compromise proposal on the jurisdiction over professionals. Have other professional groups, those who are in the "Coalition To Save the FTC Jurisdiction Over the Professionals," been consulted during the negotiations?

Mr. MILLER. Absolutely. I think it is probably not accurate to characterize them as negotiations but extended discussions. I have met with the dental hygienists. I have met with a representative of the nurses, the commercial opticians—a whole host.

Senator GORTON. Their views will be taken into account?

Mr. MILLER. Yes, of course. And that will be my personal position. I have also been in consultation with members of the Commission. I think it is very important, Senator, that the Federal Trade Commission be reauthorized, and this is an extraordinarily controversial matter.

There may well be ways of working out or insuring that the legitimate concerns of the members of the AMA are attended to while retaining for the Commission the authority to police deception and fraud and price-fixing and boycotting and other restraints of trade in this area.

And, as we discussed earlier and Ms. Bailey referred to, the proposal by Congressmen Dingell and Broyhill is one such proposal. The proposal advanced by Senator Rudman is another proposal. So the discussions I have had have centered on those kinds of proposals.

It would, I think, relieve the Congress of a great deal of anxiety if the groups were able to come together and agree to something that would satisfy their mutual concerns.

Senator GORTON. Thank you for that.

On another subject, Mr. Miller, the House Subcommittee on Transportation and Tourism, I believe, has asked the Commission to perform an examination of its deception authority over the years the Commission has had it. Is such a study under way by the Federal Trade Commission? If so, how long is it likely to take?

Mr. MILLER. We do have a study of deception under way and it has not yet been completed. We anticipate the staff having formal discussions with individual Commissioners in the next few weeks.

Senator GORTON. Have you involved any outside groups or organizations in commenting, the State attorneys general, for example?

Mr. MILLER. We have not. The Commission might well make a decision to circulate or publish a draft for public comment or to publish a series of questions about this for public comment, but it has not addressed that possibility yet.

In the matter of the ad substantiation that Commissioner Pertschuk identified earlier, it was one where we did ask for comment from all sectors of the society.

Senator GORTON. Would it not be premature for the Congress to consider changes in the law until we have been able to see the results of that study?

Mr. MILLER. I do not think so. The reason is, the definition I have advanced has been one that has, I think, an underlying predicate in common law that is reasonably well understood by all concerned and I think would have reduced uncertainty very much.

The reason we are performing the study is not, to my mind, any lack of conviction that a definition needs to be promulgated by the Congress, but, rather, we were asked to do so by the other body.

Senator GORTON. Thank you, Mr. Chairman.

The CHAIRMAN. Senator Lautenberg.

Senator LAUTENBERG. Mr. Miller, in response to something Senator Ford had asked before about capping, you said that $1 million sounded like a nice, round figure. I may be extending it a little bit, but how about the concept of capping altogether. Do you believe that we ought to have a cap on this?

Mr. MILLER. I think some cap makes sense. I do.

Senator LAUTENBERG. You will have to tell me why, please.

Mr. MILLER. I believe it reduces uncertainty. The Federal Trade Commission has a great deal of authority and, of course, while people have remedies in the private courts if they think the Federal Trade Commission has exceeded its authority, it is often the case that people feel discretion is the better part of valor.

Some reduction in the uncertainty created by an open-ended FTC I think is appropriate. So I believe a cap of some kind is appropriate. Just like you would not necessarily give to a judge complete discretion in sentencing an individual.

Senator LAUTENBERG. But you certainly would not cap it. You would not say there is a maximum.

Mr. MILLER. You do have maximum sentences, too.

Senator LAUTENBERG. Not being a lawyer, I do not remember anybody saying—is a judge limited by a maximum penalty?

Mr. MILLER. Not at the present time, although there are—as Commissioner Pertschuk points out in his statement—there are standards, there are legislative or judicial interpretations.

Senator LAUTENBERG. I thought you were talking about the criminal penalties.

Mr. MILLER. Well, in criminal penalties, too, I should hope that there is a cap on the penalty that might be imposed on someone caught for speeding. I, luckily, have not been caught for speeding in quite a while, but I would hope that there would be some cap.

Senator LAUTENBERG. There may be a cap on individual violations, but there is no limit on the total number of fines one can incur. The same holds true with the FTC. There is a cap of $10,000 a violation, but no cap on the total penalty. I just get the feeling that striving for a definition here is not a particularly noble objective. The objective is to make those who violate the rules pay for it. With a cap of $1 million, $10,000 a shot, you are talking about, what, 100 violations. It is conceivable that here could be enough of a commercial enterprise out there to say look, that is not a bad fee to pay for something like that.

Ms. BAILEY. If I could, I would like to comment. I am one of the members of the Commission who opposes a cap. The very reason is—one of the reasons is one that the chairman gives for liking the proposal. That is, it will indeed reduce uncertainty. It will make it more certain, for example, that Reader's Digest could spend $1.4 million to mail out a deceptive mailing and not face the possibility of being fined $1.7 million but only $1.4 million, and it could be a decision factored into the cost of doing business, which I think would create the wrong kind of certainty.

Mr. MILLER. I think, and Commissioner Pertschuk has something to say too, but in fact my major concern in this is the point you raised, Senator. That is, that we impose the right penalty. In fact, I feel that in the past in too many cases we have imposed too small a penalty.

People who engage in fraud and deception are going to be penalized by the Federal Trade Commission, and that word should go out with great fanfare.

Mr. PERTSCHUK. No, Senator Lautenberg. I think you have put your finger on what concerns me. That is, the certainty. The most we can get stung if we proceed with this operation is $1 million. Now maybe that is not a rational calculation a cost-benefit analysis of a firm would do; however, in some of the auto defect cases the Commission has ordered automobile companies to engage in defect repairs, in one case amounting to as much as $100 million. A firm could very well say it is not worth it—we will not do it. There are other pressures on the firm, of course, but it is conceivable it could weigh the $100 million of defect repair obligations against the $1 million penalty and decide to pay the penalty.

Senator LAUTENBERG. That would not be the only deterrent in that case. They might be subjected to civil liabilities that would be perhaps even greater.

Mr. DOUGLAS. I would just like to make that point clear, that if there is a cap on the civil penalties, that does not cap the redress that we could order where there was consumer injury. In terms of deterrence, I think the redress is equally as important, if not more important. In terms of equity it is certainly more important.

I would rather see the injured parties be compensated than the $1 million go to Uncle Sam.

Senator LAUTENBERG. I know my time is up, Mr. Chairman. My point is I think Government has a responsibility to say look, we care enough about this matter that we are not willing to leave it to the courts: We have a responsibility to protect the consumer, and I think one of the best ways to do it is to require that if you violate the rules you will pay.

Thank you.

Mr. PERTSCHUK. Mr. Chairman, I have an ecumenical suggestion. That is, if the committee is determined to cap the penalties that it also consider strengthening the Commission's redress authority, which does have some serious limitations.

The CHAIRMAN. Fortunately, you will find this Committee, as opposed to the commission, is very unified on this subject.

It hardly becomes us to question why you are not unified.

Mike, we have talked a lot about limitations on the FTC. You suggested in your testimony that we should be expanding the powers of the Commission. Do you want to elaborate?

Mr. PERTSCHUK. Mr. Chairman, I do have some ideas. I refrained from elaborating on them in the testimony. There are some areas, I think in the area of auto defects, for example, the Commission has gotten off to a good start. I suspect a rulemaking defining defects would be useful for Congress to direct us to do it.

There are—I hesitate to mention the subject—some specific insurance issues which the Commission is restrained from looking at, such as following up on our studies of medicare fraud and gaps for the elderly on medicaid insurance. I believe a serious area of concern—and I know it is one you have expressed a concern about—is the enormous increase in beer and wine advertising which has some evidence as being directed towards the younger audience. Perhaps the Commission could do a study of that.

As a matter of fact, Mr. Chairman, about a decade ago the committee asked each of the members of the then-Commission, which was unlike this Commission—quite a divisive Commission—to submit to the committee individual ideas for how the role in consumer protection could be strengthened. Out of those hearings there came a very specific set of legislative ideas.

I would like the opportunity to submit some specific ideas to you and suggest that each of the Commissioners be requested to do the same.

The CHAIRMAN. I am receptive to receiving your ideas at any time. Mr. Chairman, let me ask you this and the other Commissioners.

On section 5(m)(1)(b) Does serve a valuable enforcement purpose?

Mr. MILLER. It does provide for enforcement. If we find a practice that is unlawful we can apply it to, other companies involved in the same practice.

The CHAIRMAN. You know the argument that is made. They never violated anything before; they never had a notice. How do they know what "Jones" cannot do, "Smith" cannot do?

Mr. MILLER. We can only apply that if we have given them advanced warning, but it does make sense to me to codify the Brazwell decision to give them an opportunity to challenge the decision by the Commission.

The CHAIRMAN. On major decisions of this kind, there are very few private enterprises who are caught unaware by your decision; is that not correct?

Mr. MILLER. Yes. The defense to that is that they did not receive that information.

The CHAIRMAN. They did not what?

Mr. MILLER. That they did not receive notice.

The CHAIRMAN. I understand that is their defense. I find it hard to believe in this day and age of good trade associations and incredibly large businesses. In fairness you probably would not bring a correlative action against a small company who genuinely sits out in the boondocks and had never heard of you, let alone your order. You would probably not hold them to the same standard that you might hold a goliath to.

Mr. MILLER. We might hold them to the same standard, but we would surely express a great deal of empathy for their lack of sophistication and knowledge about the matter and work with them toward that end.

The CHAIRMAN. I misspoke myself. Clearly you would hold them to the same standard, but any company in the Fortune 500 or the Fortune 1,000 would be hard pressed not to know about major decisions of the Federal Trade Commission affecting their business.

I can understand if you put out a decision relating to refrigerators and they made shoes they would not know about it.

Ms. BAILEY. By and large, a synopsis of the decision is prepared and sent. When we suspected at one time very widespread violation of the Truth in Lending Act—and let me say it is easy to violate that act—but widespread in one industry, we sent out 60 or 70 or 80 copies of the synopsis to builders of all sizes and within a very short period of time over 50 of those had contacted the Commission and brought their advertising into compliance with the law.

That is basically what happens and only those who continue to argue for a year with the staff are those who we finally wind up having to take action against and it is not because they do not know what the law is.

The CHAIRMAN. Slade, do you have any more questions?

Senator GORTON. No.

The CHAIRMAN. What do you think about the Chamber's proposal to limit the Commission's unfair method of competition mandate and make it coextensive with the Sherman Act?

Mr. MILLER. Mr. Chairman, I believe that unfair methods needs to be defined by Congress. It is very unclear. If you obtain the services of five leading antitrust scholars and sat them down at this table and asked them to take a test on what "unfair methods" mean——

The CHAIRMAN. I understand you want to define it, but do you want to make it exactly coextensive with the Sherman Act?

Mr. MILLER. I have no particular proposal to advance at this time. That is certainly a step in the right direction in the sense of defining what it means. Whether it should go beyond the Sherman Act or not is something that I have not concluded.

The CHAIRMAN. Do others want to comment on that?

Commissioner Clanton?

Mr. CLANTON. Mr. Chairman, I would not agree with the notion of limiting section 5 to the Sherman and Clayton Acts. The very reason for the Commission's whole jurisdiction in this area was to be able to take account of situations where the essence of the Sherman Act, which focuses on agreements and monopolistic type behavior, really isn't suitable for dealing with the conduct.

I also would point out that our remedial structure is different. We are not talking about criminal penalties; We are talking about civil remedy. We are talking about an administrative process that is forward-looking in terms of any remedy. Nevertheless, I do not think there are a large range of cases beyond the Sherman and Clayton Act that would justify commission action.

I suggested one area in a statement I made in conjunction with our dismissal of the *Kellogg* case pointing out situations where you may have conduct by firms in a highly oligopolistic situation that may not amount to an agreement but may well facilitate interdependent pricing or may well eliminate efforts to eliminate competitors.

I think some flexibility is good. I do not know how you codify that in a single statement, but I do not think there is a record in the past of the Commission having gone far afield. There are certainly people who have argued that there is a threat of that happening. While there are some cases in the past that I would not fully agree with in terms of the analysis, they do not suggest that we have unlimited authority.

I think we have to be guided by the Sherman and the Clayton Act, but we should have flexibility to go beyond that when the conduct in question does not fit neatly within those contours.

The **Chairman**. Senator Lautenberg, any further questions?

Senator **Lautenberg**. Just one thing, Mr. Chairman.

Mr. Miller, you talked before about the fact that your Bureau of Competition was reviewing the GM-Toyota relationship and I understand you have instituted some personnel changes in that area. I do not know whether the period of time for review you talked about has anything to do with either limiting or shifting personnel, but——

Mr. **Miller**. Could you be more specific?

Senator **Lautenberg**. You are making changes in the Bureau of Competition—personnel changes—are you not?

Mr. **Miller**. The only thing that I am aware of is that our Director of the Bureau of Competition, Tom Campbell, has accepted a law professorship at Stanford University and will be leaving the Commission in probably a month or so. But that is the only thing I am aware of.

Senator **Lautenberg**. Have you not directed any other diminishment of staff?

Mr. **Miller**. No.

Senator **Lautenberg**. Do you have enough staff to do the monitoring that that department has to do?

Mr. **Miller**. Yes, I believe we do. By the way, Director Campbell will be testifying on that matter on a panel shortly. He is a very fine individual.

Senator **Lautenberg**. Are there cases being taken on in that department on a regular basis, additional cases?

Mr. **Miller**. Absolutely. We would be glad to send you the facts and figures on the case load.

[The following information was subsequently received for the record:]

FEDERAL TRADE COMMISSION,
OFFICE OF THE CHAIRMAN,
Washington, D.C., May 3, 1983.

Hon. FRANK R. LAUTENBERG,
U.S. Senate,
Washington, D.C.

DEAR SENATOR LAUTENBERG: At our reauthorization hearing before the Committee on Commerce, Science, and Transportation on March 16th, you requested pertinent data regarding cases being generated by the Bureau of Competition on a regular basis. I am happy to respond to your request.

The generation of new cases challenging practices that impair competition and harm consumers is a high priority for the Bureau of Competition. The first step in generating new cases—and the one that Bureau managers can most effect within a typically short time frame—is opening new initial phase investigations. The following table reveals that the Bureau's recent performance in generating new investigations is equal to or better than its performance in past years:

Nonmerger cases [1]

Initial phase investigations opened:	
Fiscal year:	
1979	90
1980	143
1981	134

1982	100
1983 [2]	76

[1] We have omitted initial phase investigations of mergers from this tally because business trends and the number of Hart-Scott-Rodino premerger notification filings, factors that generally are beyond the control of Bureau managers, substantially affect the number of initial phase investigations of mergers.

[2] Through March 1983 (the first 6 months of fiscal 1983).

This table shows that during Fiscal 1982 (October 1, 1981 through September 30, 1982) the Bureau of Competition opened non-merger initial phase investigations at a rate roughly comparable to the average rate of the preceding three years. If initial phase openings in Fiscal 1983 continue at the rate of the first six months of the year, the total will reach a significantly higher level than in any of the preceding four years. This is in spite of lower resources available to the Bureau during the last two years.

Because, in my view, the Commission's antitrust performance during the 1970s was often misdirected, as reflected both in the Commission's tendency to attack arrangements that in reality benefited consumers and in the Commission's increasingly poor faring in the Courts of Appeals,[1] the Bureau has undertaken several initiatives during the past year to generate cases that are sound economically and will survive court challenges. First, the Bureau started a targeting project to identify industries whose performance could be symptomatic of anticompetitive conduct. Second, during the past year the Bureau enlisted attorneys from every one of its divisions in a month-long case generation project. This effort yielded 79 new possible initiatives, many of which led to investigations. Finally, the Bureau has stressed case generation as a continuing obligation of Bureau managers, commencing case generation projects in each litigating office and making case generation an explicit criterion for annual evaluations of Assistant Directors.

Just as the Bureau has been active in opening new investigations and in generating new cases outside the merger area, it has been vigorous in challenging anticompetitive mergers. For example, in Fiscal 1982 the Bureau of Competition brought preliminary injunction actions actions against the three proposed mergers of Mobil and Marathon, Gulf and Cities Service, and LTV and Grumman—more preliminary injunction actions than in either of the two preceding years. Other gypes of Fiscal 1982–83 Bureau merger challenges, such as administrative complaints (3) and consent decrees (9),[2] also showed considerable activity. These figures are especially significant because several of the mergers that we challenged were large and complex, consuming far-above-average amounts of resources.

Of course, the number of cases that the Commission brings is not, by itself, an adequate measure of the impact of our efforts. (Of obvious import, our success or failure as a law enforcement agency is better measured by the degree to which those subject to our laws and rules comply with them, not how frequently we bring cases.) The public is often better served by large, resource-intensive cases with significant economic impact than by more numerous small cases with less economic impact. In addition, ill-considered cases can actually harm rather than help consumers. Consequently, the Bureau has devoted significant resources to identifying cases that will result in the greatest benefit to the public. Undue emphasis on simply filing cases, disregarding their economic impact, reduces the effectiveness of resources committed to this important effort.

As always, I welcome your comments and suggestions, as the Commission attempts to fulfill its congressional mandate to maintain competition in the marketplace. If I can be of further service, please let me know.

Sincerely yours,

JAMES C. MILLER III, *Chairman.*

Senator LAUTENBERG. How does each of you feel about the performance of that Bureau? Are you generally satisfied?

Mr. PERTSCHUK. No.

The Chairman said he would submit a statement on the performance of the Bureau. I would be happy to submit my comments along with those.

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[1] On five occasions in the past three years, Courts of Appeals have overturned Commission antitrust orders on grounds that the Commission's conclusions were, in some critical respect, unsupported by substantial evidence.

[2] This number includes both final and provisional consent decrees.

I think in general while I too admire Tom Campbell that the Bureau has not been producing the output of cases and investigations that it should be producing.

[The following information was subsequently received for the record:]

Federal Trade Commission,
Office of the Commissioner,
Washington, D.C., April 5, 1983.

Hon. **Frank R. Lautenberg,**
U.S. Senate,
Washington, D.C.

Dear Senator Lautenberg: At the March 16 hearing of the Senate Commerce Committee, you asked the Federal Trade Commissioners to give you their veiws on the performance of our Bureau of Competition. I stated that I believed its performance was inadequate and I promised to supply you and the Committee with more specific information. In this letter, I review the performance of the Bureau compared with prior years and I point out some specific areas where enforcement has been essentially non-existent.

NUMBER OF CASES

The following chart shows the number of complaints, orders and federal court actions brought by the Commission in the antitrust area. I have also attached an appendix which explains each category.

Type of action	Fiscal year—						
	1977	1978	1979	1980	1981	1982	1983 [1]
Administrative complaints	9	6	11	13	7	2	1
Part II consents:							
Provisional	12	15	21	21	11	9	1
Final	15	6	26	21	16	5	5
Part III consents:—							
Provisional	4	6	7	1	6	1	2
Final	4	3	8	3	4	1	1
Final part III orders	6	8	6	4	5	7	2
Civil penalty actions filed	2	2	3	1	3	1	0
Preliminary injunction cases filed	5	2	4	0	2	3	0

[1] Through Mar. 28, 1983.

In interpreting this chart, it should be kept in mind that the same case is recorded in more than one category. For example, an administrative complaint could be issued in a particular matter in fiscal year 1978, then be recorded as a final order or consent in fiscal year 1982. One corollary of this is that a decline in administrative complaints or provisionally accepted consents insures that there will be few final orders in future years. Consequently, the decline in these categories during the last two years assures a lower output in the near future. Also, this reliance on past actions means that final orders in fiscal year 1982 and fiscal year 1983 during the current administration are largely based on previous actions taken under different Bureau and Commission leadership.

SPECIFIC AREAS OF ENFORCEMENT

It is useful to review the performance of the Bureau of Competition in certain specific areas of enforcement—mergers, monopolization, price discrimination, resale price maintenance, and horizontal collusion.

MERGER ACTIVITY

The most active area of Commission antitrust activity during the current administration has been in the merger area. I believe a major reason for this relatively active presence (though extremely modest by historical standards) is that the Hart-Scott-Rodino Act forces the Commission to decide whether a merger will be challenged within a short period of time. This "action-forcing" procedure tends to force the Bureau of Competition to forward recommendations to the Commission where they can then be acted upon. In other areas, the Bureau tends to develop investigations and cases very slowly or not at all. Even in the merger area, of course, the number of cases is much lower than in prior years.

The Commission has brought the following number of merger cases since October 1, 1981 (approximately when Chairman Miller arrived):

(1) Administrative complaints, 3. Chairman Miller voted against the issuance of the complaint in one of these matters (*Schlumberger*, Dkt. No. 9164).

(2) Part II and III final consents, 6.[1] All of the part III complaints resulting in settlements were issued before Oct. 1, 1981; two of the four part II consents were essentially completed before Oct. 1, 1981. In one of these latter two matters (*Con-Agra, Inc.*, File No. 821-0007) the Commission accepted the settlement over the objections of Commissioner Bailey and myself, who felt it was too weak.

(3) Preliminary Injunction cases, 3. In one of these matters, Mobil Corporation's proposed takeover of Marathon, the Commission (over the objections of Commissioner Bailey and myself) filed papers in federal court stating the merger could take place under certain conditions. Fortunately, the merger was enjoined in a private suit and the Commission's position which would have allowed most of the acquisition was mooted. In all, during fiscal years 1978–81, 21 part III administrative complaints were issued in merger cases and eight requests for preliminary injunctions were filed, compared to three administrative complaints and three requests for preliminary injunctions from Oct. 1, 1981 to Mar. 1983.

Another indication of declining merger activity is a steady drop in the number of requests for information sent out pursuant to the Hart-Scott-Rodino Act. These requests are used to obtain information about proposed mergers during the waiting periods provided in the Act. The number of these "second requests" for each year is shown below:

Number of FTC second requests under H-S-R

Fiscal year:	
1978	23
1979	58
1980	36
1981	48
1982	26
1983 (through Mar. 28)	2

PRICE DISCRIMINATION

The Commission has brought no new price discrimination cases since Chairman Miller arrived, nor has it won a settlement. Two price discrimination cases, brought earlier by the Commission, *Gillette Co.*, Dkt. No. 9152 and *Ford Motor Co.*, Dkt. No. 9113 have been withdrawn from adjudication but have never been acted upon by the Commission.

MONOPOLIZATION

The Commission has not brought a new case in this area since Chairman Miller arrived. The only significant Commission action concerning monopolizing conduct undertaken by this administration has been to weaken substantially an earlier Commission order in *Borden, Inc.*, Dkt. No. 8978, which had already been affirmed by the court of appeals.

RESALE PRICE MAINTENANCE

The Commission has issued three orders involving resale price maintenance since Chairman Miller arrived. However, a review of these matters shows that each was essentially completed before the new administration began and no new cases have been brought. The following RPM orders have been issued since October 1, 1981:

(1) *Onkyo U.S.A. Corp.*, File No. 801-0117; provisionally accepted before Oct. 1, 1981.

(2) *Germaine Monteil*, File No. 801-0080; signed by the staff and the respondent before Oct. 1, 1981.

(3) *Russell Stover Candies, Inc.*, Dkt. No. 9140; on appeal when Chairman Miller arrived and he dissented from a finding of liability.

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[1] As of Mar. 28, 1983, two consents in merger cases had been provisionally accepted and were awaiting final acceptance.

In short, there have been no resale price maintenance cases completed for which the new administration can claim credit. Instead, Chairman Miller continued to press for a complex economic analysis before any resale price maintenance case is brought, an approach which has so far resulted in no new cases. In contrast, there were 24 final RPM orders during the fiscal year 1977–81 period.

ORDER MODIFICATIONS

The only area in which the Bureau of Competition has recently excelled is in weakening existing Commission orders. The number of order modifications granted by the Bureau in recent years is shown below.

Number of modifications

Fiscal year:	
1977	0
1978	3
1979	0
1980	2
1981	5
1982	15
1983 (through Mar. 28)	5

Although I supported some of these modifications, I strongly believe that others were inappropriate or excessive. These figures illustrate that the Commission is spending more resources in weakening existing orders and has encouraged more and more companies to petition for modification during the current administration.

HORIZONTAL COLLUSION AND FACILITATING PRACTICES

Despite the promise of activity concerning horizontal price-fixing activity, no such cases have been brought. There have been two consent agreements involving colusion by medical groups. These are laudable cases but the numbers are small given the low level of activity in other areas.

CONCLUSION

The fact is that enforcement activity has declined to the lowest level in several years. Even the modest level of activity in fiscal 1982 and 1983 represents, to a large extent, a completion of cases initiated before the current administration arrived. To the best of my knowledge, there is no evidence that anticompetitive activity has sunk to record lows or that the Justice Department has aggressively seized the opportunity to fill the gap. Indeed, historically recessions intensify the pressures and incentives to evade the discipline of competition. This is not "lean and mean" enforcement. It represents a law enforcement famine.

Sincerely,

MICHAEL PERTSCHUK,
Commissioner.

APPENDIX—DEFINITION OF TERMS

Administrative Complaints—allegations filed when Commission has "reason to believe" the law is violated; the issuance of an administrative complaint under Part III of the Commission's rules begins a formal adjudicatory proceeding.

Part II Consents—consent settlements which resolve a matter before an administrative complaint is issued beginning a formal adjudicatory proceeding. "Provisional" consents are those accepted for public comment. Consents become "final" upon final approval by the Commission after the comment period.

Part III Consents—consent settlements which resolve a matter after a formal adjudicatory proceeding has begun. "Provisional" and "final" consents are analogous to Part II consents discussed above.

Final Part III Orders—orders which are issued after a trial and any appeal to the Commission.

Civil Penalty Actions—suits filed in federal court alleging that respondents under an existing Commission order have failed to comply.

Preliminary Injunction cases—suits filed in federal court by the Commission seeking to enjoin some action by the companies (e.g., a proposed merger) until the Commission can determine its legality in an administrative proceeding.

Mr. **Miller**. Could I comment on that by saying I think it is too frequent that law enforcement agencies focus on numbers. Our purpose is to get people to comply with the rules and comply with the laws. To the extent we can do this in a less litigious manner I think we use leverage that enhances the public interest.

It is also the case that the Federal Trade Commission could bring a number of kinds of investigations and suits that really do not help consumers. I think Tom Campbell has done a masterful job in following the policy direction of the Commission and bringing the appropriate kinds of cases and investigations for that Bureau.

Senator **Lautenberg**. I am not an advocate of quantity over quality, but I was curious as to whether or not the staffing levels were where they should be and the number of things that come before them are properly acted upon. But we will be getting more information on that.

One other thing, Mr. Miller. The staffing level of the regional office in New York, what would it be under the administration's proposal?

Mr. **Miller**. It is a proposal that has been worked out after extraordinarily long and detailed negotiations with two Appropriations Committees in the Congress and accepted by the Commission. The level of workyears at the New York regional office would be 18.

Senator **Lautenberg**. And that compares to—how was it?

Mr. **Miller**. It was 39.

Senator **Lautenberg**. It was 39, reduced to 18?

Mr. **Miller**. Yes.

Senator **Lautenberg**. Is that enough to get the job done? Where do the complainants from New Jersey go?

Mr. **Miller**. As you may know, Senator, the Commission recommended to Congress a substantial restructing of our regional offices that would, I think, have made some advances, but it was also restructuring that was arguably voted on by the House of Representatives and overwhelmingly approved.

We did follow the will of Congress as enunciated by the two Appropriations Committees. I think the job can be done. You have my assurance that we will do our very, very best.

Senator **Lautenberg**. With the reduced staff you think you can cover the amount of activity that goes on in that area?

Mr. **Miller**. Yes.

Ms. **Bailey**. Senator Lautenberg, if I could add to that, I appreciate the Chairman's view on that. I think the actual answer from my point of view is we do not know. We have had some offices in the past that have been at about 18, some a little under, some a little over, that have performed well. To some degree I think it depends on where it is, the amount of business.

This reduction in the New York office will mean a reduction to about seven attorneys for the whole area, a large area of commercial activity. Obviously we will do everything we can to see that it functions efficiently and well at that level, but I think the truth is we have not had the experience yet at that level for all the regional offices and we will just have to see how it works out.

Mr. **Miller**. I think that there will be 10 attorneys.

Senator **Lautenberg**. It sounds like there were a lot of people who were not very busy in the past, if you can do it with that kind of a reduction now.

Mr. Clanton, is your smile a sign of agreement?

Mr. **Clanton**. No, I would trust that was not the case.

Just an additional observation. I know you do not like to hear variations on all these views, but——

Senator **Lautenberg**. I do. I am still learning.

Mr. **Clanton**. After listening to Senator Danforth I am reluctant to step in and offer any variation. Obviously we do not have a lot of experience with 18 or whatever that number or figure is across the board. As Pat indicated, we have had good programs in other smaller regions where there is not as much activity.

We are going to have to probably increase productivity out of a smaller group in that sense and to make sure that we do more. One possible effect that might come about is even a greater emphasis on consumer matters in regional offices versus competition. Obviously, we need to have both capabilities in the regional offices.

On the other hand, probably two-thirds of the activities in the regions have been consumer activities. That is an area where they may have a comparative advantage over headquarters. Frankly, there are more consumer problems that crop up on a local or regional issues than there are antitrust issues.

Antitrust problems can be handled at least as effectively at headquarters. I think we will have to take a look at it and see how well it works in each of these particular regions to determine down the road what the proper mix should be. It will just require more intensive effort to make it work.

Mr. **Pertschuk**. Senator Lautenberg, it seems to me there are two questions—first of all, whether an 18-member office can do anything useful. I think the answer clearly is yes. The second question is whether an 18-member office in New York can adequately cover the major financial center of the country. The answer, I think, is clearly no.

The **Chairman**. We have a vote going on right now. I have some other questions for the Commission that I am going to give to you in writing and let you go.

[Recess.]

The **Chairman**. The committee will come to order.

We will take Attorney General John J. Easton of Vermont, representing the National Association of Attorneys General.

Let me explain, Mr. Attorney General, what our time situation is. We are voting on cloture now on the bill. If cloture passes, there will be no votes for a while. If this particular cloture vote does not, there will be another right behind it, so you have got about 15 or 20 minutes for sure, and I am not sure beyond that where we are.

Mr. **Easton**. Mr. Chairman, that is far more time than I expected to have or would need.

The **Chairman**. That counts for my questions too.

Mr. **Easton**. Well, fortunately I see you are the only one here, so you have a lot of time for questions.

STATEMENT OF JOHN J. EASTON, ATTORNEY GENERAL OF VERMONT, REPRESENTING THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL

Mr. EASTON. Let me introduce myself and give you a little background because I think it might help focus my testimony and my reason for being here. I am here representing the National Association of Attorneys General, which has taken a position on some of the issues pending before—or pending as part of this reauthorization bill.

In addition, I am here to bring you the perspective of an attorney general who runs, among his other functions, a consumer protection effort. Although we have an antitrust law in Vermont, I will describe in my testimony that we have some severe problems with antitrust enforcement at the State level.

I have the background before becoming attorney general of running Vermont's consumer protection program for 3 years, followed by 2 years in the medicaid reimbursement area. So I am familiar with some of the health care issues as well as consumer protection issues. I have been attorney general since 1980, so I am now speaking from that perspective.

I have written remarks which I submitted for the record last July when I was before this committee when the committee heard testimony on the deception issue. Because I understand that at least on the House side there were some questions concerning deception, I have once again submitted my July testimony to the last Congress and this committee, for the record because I think some of the illustrations that I made in my written remarks will be helpful to the committee.

In the area of deception, let me just suggest to you that I think we who enforce mini-FTC acts—and I should point out that while every State has some form of consumer protection law, most are patterned after the Federal Trade Commission Act and about 20 of those actually direct the State courts to look at the precedent from the Federal courts and the decisions of the Federal Trade Commission.

Those of us who enforce State consumer protection laws do not feel there is any uncertainty in the standard of deception. I think it is our feeling that, if anything, there is a solid body of precedent, 45 years now of court decisions and administrative decisions since the Wheeler-Lea amendment back in 1938.

We do not find there is any uncertainty and we do not see the problem that Chairman Miller seems to find. We would submit to you there will be far more uncertainty should the Congress try to amend section 5 of the Federal Trade Commission Act.

We are further concerned that any amendment of section 5 would have a definite and direct impact on the States, despite, I think, some legislative proposals—at least one in the House last year—that endeavored to say this is not intended to affect the States. Regardless of whether a statute said that the Federal Trade Commission Act would not affect the States, in practical consequences it certainly would.

There is no way that a small State such as mine, or most of the other States, can enforce a higher standard of business conduct than the Federal Trade Commission can enforce. I cited last summer when I testified the problem that the Attorney General, now Governor of the State of Texas, Mark White, had when he was trying to take action against General Motors on some of their advertisments. In effect what happened in Texas is that he was limited in the settlement to the standard that the Federal Trade Commission made with General Motors. That would be the problem.

As a practical matter, we would not be able to enforce any stricter standards.

The CHAIRMAN. How big is your office?

Mr. EASTON. My office in the area of consumer protection has 3 lawyers. I have about 20 lawyers reporting to me directly.

I see my time is nearly out. I want to mention to you some of the problems I see with a professional exemption. I understand the professions are coming in and suggesting to the Congress that they should not be covered by the Federal Trade Commission Act because they are licensed and regulated by the States.

Well, indeed we do license the professions. We do concern ourselves with the discipline of professionals and their competence, but we do not take or the States do not take action concerning business practices unless they have antitrust units or antitrust laws. About half of the States. I have a list of 28 States—have not been able to use their antitrust laws. Some States do not even have antitrust laws. Some States have antitrust laws that exempt——

The CHAIRMAN. Go ahead and keep going. Don't worry about the bell.

Mr. EASTON. Four States have no antitrust laws. About 9 States have antitrust laws but the professions are exempted from coverage of those antitrust laws. Only about 10 States have been able to use their antitrust laws. An addtional 28 have not.

I must say Vermont is one of those States which has not been able to use our antitrust laws against business practices of the professions. Why? We, for a brief time, had an antitrust unit when the Hart-Scott-Rodino bill was passed, and the Justice Department funded the States that wished to pursue antitrust enforcement.

When that money ran out, our State legislature chose not to continue an antitrust unit in my office. As a result, when we had an issue that directly concerned business practices of professionals, my office did not have the wherewithal to investigate this headline: "75 Burlington Doctors Refuse to Join HMO."

In 1981, Vermont was about to have, we thought, the first health maintenance organization in the State. Before our Health Policy Corp. there was an application for a certificate of need and also an application to receive some Federal funds. About that time, we started seeing headlines like this. We even saw advertisements in the newspapers by physicians telling people why they should not become part of a health maintenance organization designed to reduce costs.

I must say that the HMO never did get off the ground and doctor resistance was one of the reasons cited. I simply did not have the capability to investigate whether or not that was anticompetitive and violated antitrust laws. Had we not had a Federal Trade Commission with authorization over professionals, a practice like that in the past and in the future could go unchecked.

So I would urge you not to exempt the professions from scrutiny. I think we States can properly exercise our supervisory powers in terms of licensing and discipline over the professions without granting them an exemption from the Federal Trade Commission Act.

I would be happy to answer your questions, Mr. Chairman.

The CHAIRMAN. You have heard some comments that we should add a cost-benefit requirement before you can bring any actions. How would that affect your office?

Mr. EASTON. Let me suggest to you that I think that is a very fine administrative tool for those who are charged with law enforcement to use. In fact, I indeed use it as a factor when I decide whether to allocate my scarce resources to enforcing a deceptive practice in my State or when we did antitrust enforcement before the Antitrust Division dried up.

We applied cost-benefit analysis as a management tool, as an administrative tool, to determine what would the impact of enforcement be, what would the benefits be, what would the cost of taking action be. If we grafted it into the law, if we make it a part of the statutory requirement, I fear that a cost-benefit analysis will then become part of the litigation and we will actually be introducing in the court proof as to what is the benefit of enforcement, what is the cost of enforcement and the impact on consumers, and that is an unnecessary standard.

The CHAIRMAN. You would prefer in the area of professionals that we simply leave the law the way it is?

Mr. EASTON. Exactly, Mr. Chairman.

The CHAIRMAN. Not adopt the so-called Dingell-Broyhill compromise or the Rudman compromise? Your first preference, speaking for you and the Attorneys General, is to leave the law the way it is?

Mr. EASTON. That is right. The association adopted a resolution opposing the enactment of any limitations on the ability of the Commission to enforce the Federal Trade Commission Act with respect to the professions, and I would submit that there needs to be no limitation on the FTC authority over the professions.

The CHAIRMAN. Let me move on to unfairness. You saw four of the Commissioners would codify it. The fifth one, Mike Pertschuk, has no objection with the standards they are using; he just would not codify at the moment. You are opposed to codification. Would you elaborate on that a little bit?

Mr. EASTON. I will and I will invite your staff to review the testimony submitted about a year ago during reauthorization hearings by an Assistant Attorney General from Massachusetts, from Frank Bellotti's office, John Montgomery, who explained in more detail what the problems are with codification in the unfairness area.

The proposals we were aware of at that time—and I understand Chairman Miller is proposing once again—would say that unfair acts are limited to those that cause substantial injury not reasonably avoidable and not outweighed by countervailing benefits to consumers. It is our feeling that if this were imposed under section 5, the impact on the States that I mentioned when I talked about deception would also come down on us when we tried to litigate questions of unfairness.

We think it is a valid management tool to be used to look at cost-benefits before proceeding, but we do not think that it should be brought into the courtroom to litigate.

One of the differences between the Federal Trade Commission and the States is that we litigate in courts of law, not before an administrative law judge. So that means we have a more formal setting and we will have to bring into the courtroom economic experts to talk about the cost-benefit, so to speak, in this unfairness area and we just do not have the resources to do that.

The **Chairman**. Lastly, and this is on deception, run by me again why you think a statutory definition of deception is going to place—and I am quoting you—"a considerable and unnecessary cost on the States and add new ambiguities." You touched on it, but I would appreciate it if you would elaborate on it.

Mr. **Easton**. I would be happy to. First of all, if we scrap some 45 years of precedent, if we get rid of all of this case law, the States are going to have to litigate each and every issue that we now can look to these volumes—and there are over about 70 volumes of FTC decisions. Those are in addition to the cases that are reported in the Federal Reporter system. We would have to go back and litigate each and every new issue because we would not have the Federal Trade Commission precedent that we now enjoy.

My State is one of 19 or 20 States which I mentioned in which our statute directs our court to look at the precedent established by the Federal Trade Commission. So without that we would then be coming in and trying to prove as part of every case why an ad is deceptive, why the price comparison is misleading, why bait and switch is a deceptive practice.

Furthermore, the chairman suggests that we go back to common law principles. Well, under common law, there were five elements involved. You had to prove a material misrepresentation of fact, that the seller had knowledge, that there was reliance by the consumer to his detriment, and that he suffered some injury. You would have to prove all those things if you go back to the common law standard, and that is what Chairman Miller is suggesting—go back to that common law standard where sellers' intent is important.

Right now I submit that in many cases—let me give you an example. I used it last summer, but I think it might bear bringing up again. We had an outfit that was doing business in Vermont with a catalog. I brought the catalog last time I appeared here. They were advertising in this catalog that they had herbal cures that would cure anything from bedwetting to cancer. They suggested, for example, I find in my remarks from last summer, that cayenne pepper is a miracle herb curing all forms of low diseases.

Now there were a number of consumers that read that statement and many others in that catalog, looked at all the formulas this catalog had, and sent their money. Now those consumers might have been reasonable or they might have been unreasonable consumers. But what the chairman wants to do is impose this definition of reasonable consumer or consumer acting reasonably.

A lot of people would say those people were not very reasonable to believe in 1982 that cayenne pepper was a miracle herb. Nonetheless, these people were deceived. I myself took phone calls from people who said, "Gee, I hope I get my arthritis cure because I could really use it."

That is the problem I see, Mr. Chairman, if we go with this proposal that Chairman Miller is making to go back to the common law and start focusing not on the deceptivity of the act or practice but focusing on the intent of the seller. Most people would agree there is deception here, but we certainly do not want to prove that the seller intended to deceive or prove whether or not the consumers are reasonable or not.

The CHAIRMAN. That is what you would have to prove under the chairman's definition? It is in two parts, but if you can prove that the seller deliberately deceived, then you are over the hurdle of the reasonable consumer, but you have the burden of proving deception, and that is a—you almost have to go into mental intent. You will have to do more than take the face of the ad.

Mr. EASTON. And that is certainly what concerns us. We probably would have had not only to determine the seller's intent, but we would have had to determine under the chairman's definition whether or not the consumers were reasonable, because if they were not reasonable he has a different approach, depending on whether they were acting reasonably or not.

We cannot bring in people from all over this country, bring them into a court in Vermont trying to prove whether they were reasonable in relying on those deceptive claims.

[The statement follows:]

STATEMENT OF ATTORNEY GENERAL JOHN J. EASTON, JR., STATE OF VERMONT

Mr. Chairman and Members of the committee: I am pleased to be here once again to discuss the authority of the Federal Trade Commission (FTC) with respect to certain activities. I have the pleasure last year to appear at the July 22 hearing conducted by the Subcommittee for Consumers on the FTC's authority over deceptive advertising. At that time, I testified in opposition to proposed changes to the definition of "deceptive acts and practices." I described the unique Federal-State partnership which has evolved as a result of each of the 50 states enacting statutes to prohibit deceptive representations in consumer transactions. I argued to the subcommittee that the proposed amendments were an inefficient approach which would place considerable and unnecessary costs on the States. I further suggested that the proposals would add new ambiguities and unnecessary elements of proof that would impose considerable litigation costs on the States. My remarks then are equally applicable today to any proposals to redefine deceptive trade practices. I am, therefore, submitting for the record the statement which I submitted at the July 22 hearing last year.[1]

Although I did not address at that time proposals to change the definition of unfairness, I will briefly touch on that issue. Previous legislative proposals have suggested that unfair acts or practices be limited to those that have caused or are likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or competition. The problem with such an approach is that it burdens every lawsuit with an unworkable cost-benefit analysis. The burden of proving that an act is unfair is thereby altered. Lawsuits will begin to focus not on whether an act was unfair but the appropriate definition of "substantial injury" or "benefit" and how much proof is necessary and what methodologies are acceptable for establishing injury and benefit.

Certainly a cost-benefit analysis can be a useful tool in case selection. My office endeavors to do so each time we analyze a case for investigation and possibly litigation. But don't change section 5 to codify a cost-benefit analysis which is likely to create uncertainty, confusion, and unneeded litigation.

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[1] The material referred to has been printed in the record of the Consumer Subcommittee's July 22, 1982, hearing on the "FTC's Authority over Deceptive Advertising" (Serial No. 97-134).

The thrust of my remarks today will concern the so-called "professions issue." Last year, some professions, the American Medical Association (AMA), the American Dental Association (ADA) and the American Optometric Association (AOA), sought to eliminate FTC jurisdiction over state-regulated professions. It is my belief, and the belief of the National Association of Attorneys General, that continued FTC jurisdiction is in the public interest and should be retained. In this regard, the National Association of Attorneys General has taken a position opposing the enactment of any limitations on the ability of the Federal Trade Commission to enforce the FTC Act with respect to the professions.

This country has a legal system premised on the concept of equality under the law. To establish an aristocratic elite, a privileged class to which the law does not apply, does not comport with our traditional value of equality under law. And yet that's exactly what the professions who seek exemption from FTC jurisdiction are suggesting—to be exempt from laws and enforcement efforts that govern every other businesses' behavior. A significant sector of our economy cannot be immunized from the law and set aside as a privileged class.

The professions have been heard to argue before this Committee that many activities of a professional are not susceptible to general, commercial rules. Only 1 year ago during reauthorization hearings before this Committee, the American Veterinary Medical Association (AVMA) stated: "Unlike the case with merchants and manufacturers, economic concerns are not the principal motivation of a professional. . . ." "The intimate technical and psychological relationship between a professional and his patient or client is different in kind from the relationship between, e.q., a plumber and his customer."

Support for that statement was attributed to dicta in the U.S. Supreme Court decision, *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975). In that case, the U.S. Supreme Court rejected the total exclusion from antitrust regulation which the Fairfax County Bar Association was seeking. The Court made it clear that the activities of lawyers play an important part in commercial intercourse and that anticompetitive activities by lawyers may exert a restraint on commerce.

The same argument made to this Committee by the AVMA last year was made by the Fairfax County Bar in the *Goldfarb* case: "Competition is inconsistent with the practice of a profession because enhancing profit is not the goal of professional activities; the goal is to provide services necessary to the community."

The Court's response to that argument is noteworthy. In a footnote, the Court stated: "The reason for adopting the fee schedule does not appear to have been wholly altruistic. The first sentence in respondent State Bar's 1962 Minimum Fee Schedule Report states: 'The lawyers have slowly, but surely, been committing economic suicide as a profession.' "

Previous proposals to exempt the professions such as S. 1984, are flawed not only in concept but also in the approach to their objective to exempting the professions. They are flawed because they don't define "professions." One of the sponsors to the professions exemption indicated that the term included lawyers, engineers, physicians, dentists, optometrists, architects, accountants, veterinarians, and the like.

What about opticians? Vermont licenses opticians. Are they not then a State-regulated profession which would be exempt under a bill such as S. 1984? Yet, the Opticians Association of America opposes proposals to grant State regulated professions immunity from the regulatory authority of the Federal Trade Commission.

What about chiropractors? Vermont licenses practitioners of chiropractic. Are they not then a state-regulated profession which would be exempt under a bill such as S. 1984? Yet, the American Chiropractic Association and the International Chiropractors Association oppose any exemption of health professionals from the FTC's jurisdiction.

What about psychologists? Vermont licenses psychologists. Are they not then a State-regulated profession which would be exempt under a bill such as S. 1984? Yet, the American Psychological Association and the Association for the Advancement of Psychology do not support provisions of S. 1984 which would allow professions and their associations to circumvent valid and valuable law.

What about "and the like." The AVMA distinguishes a professional from a plumber. Yet, Vermont licenses plumbers. We also license electricians, barbers, cosmeticians and hairdressers, embalmers, funeral directors, pharmacists, real estate brokers, land surveyors, and a number of others who might consider themselves professionals. Just how is the line to be drawn? Virtually any occupational group would be in a position to argue that it was exempt from FTC authority.

Through our Sunset legislation, Vermont is endeavoring to eliminate from its licensing law, those occupations and professions which do not require regulation in order to protect the public health and safety. Other states are doing the same. Nevertheless, some observers have estimated that over 100 occupations are currently licensed across the country. We simply cannot afford to elevate these groups to a special status immune from the Federal Trade Commission Act.

It has been argued by proponents of the exemption for professionals that the Federal Trade Commission would substitute its judgment in advance of how the professional should exercise his judgment. It's also been stated that the FTC's effort to regulate the professions is a debilitating weakening of the influence and effectiveness of private, voluntary professional associations. That's not the case at all.

The exclusive focus of the Federal Trade Commission's activities has been the business or commercial practices of State-licensed professionals. The FTC has challenged illegal restraints of trade such as price fixing, boycotts, bans on truthful advertising and the deceptive promotion of health care services. The statement of the National Retired Teachers' Association and the American Association of Retired Persons submitted last March to this committee contains a helpful description of some of the types of cases in which the FTC has challenged professional conduct. The list bears repeating because—unfortunately—this type of conduct still prevails despite the FTC attempts to contain it.

Doctors' agreement to boycott Medicaid patients in order to coerce Michigan Medicaid agency to increase fees paid to doctors.

Illegal threats by a small town's only doctors to boycott the local hospital's emergency room patients if the hospital persisted in plans to recruit a new physician competitor to practice at the hospital.

Ethics prohibition physicians working below "usual" rates or for "inadequate" compensation use by American Medical Association in attempt to fix price levels and prevent hospital and health maintenance organizations from reducing costs by hiring salaried physicians and passing savings on to consumers.

Conspiracies in Pennsylvania, Washington, and other states to boycott physicians who work on a salary for innovative, low-cost health maintenance organizations, by excluding these doctors from hospitals, participation in Blue Shield, local medical associations, and malpractice insurance coverage.

Sweeping advertising and customer solicitation bans denying consumers access to truthful information on medical and dental prices and services, used by professional associations to, for example, block a church organization from operating and publicizing a low-cost cardiac stress clinic, to help drive a physician house-call service in Kansas out of business, to stop a physician specialist from offering an industrial medicine program to corporations for their workers, and to prevent senior citizens from learning which doctors receive Medicare payments.

Conspiracy by doctors to obstruct a union and employer-developed cost-containment program for auto industry workers and force fee level increases by collectively refusing to participate in a state Blue Cross-Blue Shield plan.

Unlawful prohibition by American Medical Association on physicians forming business partnerships or income-sharing arrangements with licensed non-physician professionals, such as clinical psychologists.

Conspiracy of dentists to refuse cooperation with dental insurance plans' cost-containment programs.

I once thought that these types of activities occurred elsewhere but not in Vermont. The following headline in the March 3, 1981, issue of "The Burlington Free Press" makes me question that assumption: "75 Burlington Area Doctors Refuse To Join HMO." The article referred to a statement which the 75 doctors signed and sent to the Vermont Health Policy Corporation which was acting on the HMO's application for both a Certificate of Need and permission to apply for Federal funds. The article went on to indicate that 120 doctors at that point had stated they would not join the HMO. The doctors' opposition was not limited to statements submitted to the Vermont Health Policy Corporation. In addition, 45 of the doctors took out newspaper advertisements telling potential users that they would be ill-advised to participate in the plan. Incidentally, the Green Mountain Health Plan which was to be the first health maintenance organization in Vermont, never did get off the ground. Among the factors cited was the doctor resistance.

The Vermont Attorney General's Office no longer has an antitrust unit to investigate such activity to determine whether it constituted an illegal group boycott. If the FTC's jurisdiction is eliminated, I fear that future activity of this sort could occur in Vermont without any analysis to determine whether it violated the antitrust laws.

At this point I should also mention to you the position of the Vermont Coalition for Health, Inc., concerning the professions issue. This group was formed in May of 1982 to promote the allocation of health resources and to contain rising health care costs. Its membership looks like a "Who's Who" of businesses in the State of Vermont. It includes the State of Vermont as well as the largest educational, industrial, insurance, financial, and labor organizations in the State of Vermont. A broader cross-section of diverse interests is difficult to imagine. Last fall the Coalition wrote our three-member Congressional delegation to oppose any attempt to exempt the medical profession from FTC jurisdiction.

I certainly believe in reserving to the states decisions concerning qualifications, education and testing of professionals in order to determine their eligibility for a state license. Likewise, the determination of professional competence and the discipline of state licensed professionals should be handled by the States. I submit, however, that an exemption from the Federal Trade Commission Act for the professions is not necessary in order to allow the States to exercise their legitimate function in determining qualifications and competence of the professions. I, myself, am very comfortable with the position taken previously by the Federal Trade Commission when considering quality of services being provided. The FTC has given substantial deference to state judgments. I am confident it will continue to do so.

Last week, the House Subcommittee on Commerce, Tourism, and Transportation, held hearings on the 1983 Reauthorization of the FTC. While I have not seen the testimony given by interested parties, I understand that there was talk of compromise. The American Medical Association is no longer seeking a blanket exemption from antitrust and consumer protection enforcement. Instead, it is seeking to limit the FTC's jurisdiction in the sale or delivery of health care services.

The March 3, 1983, issue of "Antitrust & Trade Regulation Report", Vol. 44, pp. 492–493, suggests that the AMA would amend the Federal Trade Commission Act as follows: "The Commission shall not exercise its authority under [§ 5] to take action against a state-regulated professional, group of such professionals, or nonprofit membership association of such professionals if the act or practice or method of competition (1) is permitted, directed or required by the state as part of such state's (a) training, education, experience or other requirements for licensure of state regulated professionals, (b) permissible tasks or duties of state regulated professionals, or (c) overall scheme of regulation of state regulated professionals within the state; (2) is required, directed or permitted by a state pursuant to state law or regulations; or (3) (a) is voluntary self-regulation that is designed to protect, maintain or improve the quality, safety, effectiveness, availability or accessibility of such professional service (such as, but not limited to, accreditation of educational programs, accreditation of health care institutions certification of entry-level competence of members, peer view activities to assure quality and review reasonableness of charges and disciplinary actions to address unethical or unprofessional conduct); and (b) such benefits to consumers and any positive effects on competition that result from such voluntary self-regulation outweigh any negative effects on competition that result from such voluntary self-regulation."

The article also indicates that the AMA proposal would contain this statement: "Nothing in this section shall be construed as sanctioning boycotts or price fixing by state regulated professionals or their non-profit membership associations."

It's certainly laudable that boycotts and price fixing are not to be sanctioned. But is it the effect of the primary proposal?

This seemingly innocuous language would effectively reverse and overrule the most important Supreme Court cases dealing with the professions. Among the cases that would be overruled would be *National Society of Professional Engineers* v. *United States*, 435 U.S. 679 (1978); *Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977); *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975); and, *American Medical Association* v. *FTC*, 638 F.2d 443 (2nd Cir. 1980), aff'd, 50 U.S.L.W. 4313 (1982).

At issue in the *Professional Engineers* case was a canon of ethics prohibiting members from submitting competitive bids for engineering services. The Society of Professional Engineers argued that the restraint against competitive bidding was justified because bidding on engineering services is inherently imprecise, would lead to deceptively low bids and would thereby tempt individual engineers to do inferior work with consequent risk to public health and safety. Such justification would fit neatly under AMA proposal (3)(a)—a voluntary, self-regulation designed to protect, maintain or improve quality and safety.

Under this proposal by the AMA, the *Bates* case would also be reversed. After all, the ban on advertising was part of a plan of self-regulation by professional.

In the *Goldfarb* case, the Virginia State Bar argued that it was a state agency by law and was implementing an ethical code. Under the AMA proposal, such activity would be exempt from Federal Trade Commission scrutiny because it was permitted, directed or required by the state as part of an overall scheme of regulation.

In the *American Medical Association* case, the FTC would not have been able to pursue the restraints on advertising and solicitation in that case. The argument could easy have been made that such ethical codes were covered by (3)(a)—a voluntary, self-regulation designed to protect, maintain or improve quality of professional service.

In conclusion, I urge the Committee not to take any action which would limit the FTC's authority over the professions. A total exemption is unnecessary and uncalled for. So-called "compromise" approaches are little more than a wolf wearing sheeps clothing. They sound good but would effectively prohibit the Federal Trade Commission from taking any action where it could be argued that either the state or the profession itself was taking action.

Thank you, Mr. Chairman, for the opportunity to testify.

The **Chairman.** Mr. Attorney General, that is all I have. I appreciate your patience and I am glad I worked you in this morning. I have to go vote again. We will recess the hearings momentarily.

[The following information was subsequently received for the record:]

QUESTIONS OF THE MINORITY AND THE ANSWERS THERETO

Question. Are you familiar with the Rudman Amendment which was added to the FTC's continuing resolution in the Senate Appropriations Committee last year? Could you support such an amendment?

Answer. I am familiar with the Rudman Amendment. It would prohibit FTC intervention to invalidate State laws that set standards for training, education and experience for professionals. Since there is no history of the FTC intervening against such legitimate state requirements, I doubt such an amendment is necessary.

The Rudman Amendment would not jeopardize the FTC's legitimate efforts to prevent price fixing and monopolization by professionals. Therefore, if Congress feels it should speak as to the legitimate requirements for licensing professionals, I see no difficulty with Senator Rudman's proposal.

It is most important not to interfere with the FTC's ability to pursue price fixing and monopolization by professionals. The FTC has concentrated on this area in the past and it's important that it be able to continue to do so. Several states do not even have antitrust laws or have antitrust laws which do not apply to professionals. If the Federal Trade Commission has no jurisdiction in this area, illegal anticompetitive activities can go unchecked by law enforcement authorities.

Question. Chairman Miller proposed in his testimony that some "notion of materiality" should be included in the definition of deception—that is, actual consumer injury, as well as a reasonableness standard. Would you agree?

Answer. The materiality of the injury in a single transaction, and whether the consumer acted reasonably are not appropriate means of defining deception. It ought to be enough that the business profits by deceiving the consumer. Additional requirements would simply reward admittedly deceptive practices, because the elements do not exist, or because of inadequate governmental resources to prove they exist. They would return us closer to the previous century, where the only remedy for deception was an action for common law fraud Why reward deceptive practices by making the deception only one of several elements?

Many currently illegal deceptive practices may be permitted under the proposal. For instance, an initial deceptive contact with a consumer has long been recognized as sufficient. "Bait and Switch" tactics are one good example.

In a "Bait and Switch," the consumer is led to the showroom for an advertised bargain, a product on sale for a very low price. Often the product is simply not available at the advertised price. When the consumer arrives to buy the inexpensive product, the salesperson disparages its quality, switching the consumer to a more expensive substitute product, which may well be of high quality. Frequently the product sold is a good value, hence it is not clear whether any "material injury" to the consumer has occurred. The sale is made. The deception has been successful, though it does not directly relate to the product that was sold. Will such practices be permitted under the proposed standard?

As another example, a deceptive claim may serve its purpose, even where the injury is, in each individual case, minimal, and where the consumer can discover the deception. Where a business makes a demonstrably false claim for a product, the consumer may still perceive the product to be superior to competing products. The Polident "Gripper" may fail the test when the denture wearer bites into the apple. Yet the purchaser may reasonably believe the "Gripper" to be superior to other dental adhesives not making such a bold claim. The result? Continued purchase of the product as a result of the initial deception.

Should such deceptions be permissible? Such deceptive conduct may cause grave injury to an honest competitor, who suffers unless he too engages in bait and switch advertising, or some other deceptive practice. The proposed standard is vague and inappropriate, rewarding deceptive practices in the marketplace, making the issue not the truth or falsity of the claim, but other, essentially irrelevant considerations that are difficult and expensive to prove. False claims should not be permitted in the marketplace.

Even more questionable is a reasonableness standard for consumer conduct. Such a standard would, ironically, expose the most gullible people to the least protection. The more educated of us can avoid many common consumer frauds through analysis and care. Those who need protection may be a bit hasty in their purchase, but their dollars are every bit as valuable to the unscrupulous business.

For instance, recently in Vermont a company purporting to be running a television survey notified a substantial number of people that they had won one of 20 prizes. The prizes and their retail value were listed, none being worth less than $262. The winner could claim the prize by filling out the survey form and mailing $14.80 "to cover shipping, handling, registration, processing and postage. I attach a copy of the promotion. Most Vermont consumers figured out the fraud, and kept their money. The more gullible mailed their $14.80, winning a worthless "prize" valued at $720 on the list of prizes—a lifetime supply of coupons toward film developing.

It has been our experience in Vermont that the less likely a claim by a business is true and the bolder the consumer fraud, the more likely only the foolish and gullible will be victimized. The "reasonable" consumer more often protects himself, and is more able to. The dollars of the gullible are just as valuable to an unscrupulous business. We should not make it easier for unscrupulous people to prey upon the most susceptible people.

The CHAIRMAN. OK. With a little luck, I think we can finish up. Let us take the last panel, Mr. Krzyminski, Mr. Randall, and Mr. Campbell. We will take the witnesses in that order.

I appreciate you waiting, fellows. It accommodates my schedule, and I hope it makes it easier for you, rather than having to come back this afternoon.

STATEMENTS OF JAMES KRZYMINSKI, GENERAL COUNSEL, NATIONAL COUNCIL OF FARMER COOPERATIVES, ACCOMPANIED BY GLENN WAGNER, COUNSEL; DONALD A. RANDALL, EXECUTIVE VICE PRESIDENT, NATIONAL INDEPENDENT DAIRY FOODS ASSOCIATION; AND THOMAS CAMPBELL, DIRECTOR, BUREAU OF COMPETITION, FEDERAL TRADE COMMISSION

Mr. KRZYMINSKI. Thank you, Mr. Chairman. We appreciate it, too.

In the interest of saving time, I would like to summarize my remarks and submit my written statement for the record.

The CHAIRMAN. As usual, all of the statements will be in the record in full.

Mr. KRZYMINSKI. Mr. Chairman, I am James Krzyminski. I am the general counsel and the acting president of the National Council of Farmer Cooperatives.

Accompanying me is Mr. Glenn Wagner, an attorney from, Port Clinton, Ohio, who serves as general counsel to Milk Marketing, Inc., a dairy cooperative headquartered in Strongsville, Ohio. Mr. Wagner is an expert on milk marketing orders and the Capper-Volstead Act and will assist me in answering any questions you may have at the conclusion of my testimony.

As you know, Congress reaffirmed the primary jurisdiction of the Secretary of Agriculture over farmer cooperatives and marketing orders by providing in the FTC Improvements Act of 1980 that the Commission should not use any funds for the purpose of conducting any study, investigation, or prosecution of any agricultural cooperative for conduct which, because of the provisions of the Capper-Volstead Act, is not a violation of any Federal antitrust act or the Federal Trade Commission Act, or for the purpose of studying or investigating any marketing orders.

These prohibitions are currently in effect under the terms of the continuing budget resolution. The Capper-Volstead Act provides that producers of agricultural products may act together in corporate or noncorporate associations operated for the mutual benefit of the member producers in collectively processing, preparing for marketing, handling and marketing their products. It also authorizes them to have market agencies in common and to make the necessary contracts and agreements to affect such purposes.

Section 2 of the act designates the Secretary of Agriculture to guard against possible abuses of Capper-Volstead by requiring the issuance of a complaint if the Secretary has reason to believe that any association monopolizes or restrains trade to such an extent that the price of any agricultural product is unduly enhanced. The Secretary is authorized to issue a cease and desist order against the association.

My prepared testimony summarizes a number of events that occurred during the 1970's which caused cooperatives to ask Congress to stop the FTC from ignoring the provisions of the Capper-Volstead Act and from interfering with market orders. Each of the cooperatives mentioned in the examples is organized and operated in accordance with the requirements of the Capper-Volstead Act, yet to our knowledge, the Commission never inquired of the Secretary of Agriculture. or even made a specific ruling as to whether the Capper-Volstead Act provided immunity prior to initiating the studies or issuing the complaints.

Congress responded to our concerns by passing the FTC Improvements Act. However, not long after passage of the act, the Commission issued a complaint against Dairymen, Inc., in connection with its acquisition of Farmbest Foods. As far as we can tell, the Commission made no effort to justify its assertion of jurisdiction.

More importantly, there was not even any consultation with the Secretary of Agriculture.

We do not believe that Congress intended that the FTC only be required to pay lip service to the limitations contained in the Improvements Act. The conference report clearly indicates that the protections afforded cooperatives by Capper-Volstead are legitimate and necessary, and the FTC should not impose additional layers of authority in areas where the Secretary of Agriculture and the Department of Justice already have primary jurisdiction to prohibit illegal conduct.

Capper-Volstead is a remedial legislation designed to protect farmers who choose to market their crops through cooperative associations, from being prosecuted for conduct which would otherwise be regarded as a violation of the antitrust laws.

The legislative history of Capper-Volstead brings into sharp focus the fact that Congress specifically considered the question of whether to place section 2 authority with the Secretary of Agriculture or in the Federal Trade Commission. When the measure which passed the House of Representatives reached the Senate floor, an attempt was made to substitute the words "Federal Trade Commission" for the words "Secretary of Agriculture" and the floor debate contained pointed arguments in support of both versions.

When the vote was taken, the Senate affirmed the House version and refused to place the authority in the FTC.

We also urge you to retain the prohibition against FTC study and investigation of marketing orders. The major purpose of marketing orders is to permit an orderly flow of commodities to market. Through marketing orders we avoid as much as possible economic hardship to the farmer in times of overproduction, and conversely, protect the consumer against increased prices in periods of short supply.

FTC involvement in this area would be duplicative and costly. Responsibility for oversight and enforcement of marketing orders rests with the Secretary of Agriculture under the provisions of the Agricultural Marketing Agreement Act of 1937. The act authorizes the Secretary to enter into marketing agreements with handlers, processors, and producers of any agricultural commodity.

In the fresh fruit and vegetable industry, these orders control the flow of designated commodities to market and provide for inspection, size, and grade requirements, marketing research projects, and other requirements.

In the dairy industry, they are also used to set minimum prices that handlers are required to pay for milk.

In conclusion, Mr. Chairman, the national council supports the solution proposed last year in the Kasten amendment that would require the Secretary of Agriculture to make a final determination that the acts or transactions in question are outside the scope of the Capper-Volstead Act before the FTC could study, investigate, or prosecute any agricultural cooperative that meets the requirements of the act.

The national council also urges your support for the continuation of restrictions on the Commission's use of funds to study or investigate agricultural marketing orders.

Thank you.

[The statement follows:]

Statement of James S. Krzyminski, Vice President and General Counsel, National Council of Farmer Cooperatives

Mr. Chairman and members of the committee. My name is James Krzyminski. I am the general counsel and the acting president of the National Council of Farmer Cooperatives. Accompanying me is Mr. Glen Wagner, an attorney from Port Clinton, Ohio who serves as general counsel to Milk Marketing, Inc. a dairy cooperative headquartered in Strongsville, Ohio. Mr Wagner is an expert on milk marketing orders and the Capper-Volstead Act and will assist me in answering any questions you may have at the conclusion of my testimony.

The National Council is a nationwide association of cooperative businesses which are owned and controlled by farmers. Its membership includes 110 regional marketing and farm supply cooperatives 37 banks of the cooperative Farm Credit System, and 32 State councils of farmer cooperatives. National Council members handle practically every type of agricultural commodity producted in the U.S., market these commodities domestically and around the world, and furnish production supplies and credit to their farmer members and patrons. Two-thirds of U.S. farmers are affiliated with one or more cooperatives. The National Council represents about

90 percent of the more than 6,400 farmer cooperatives in the nation, with a combined membership of nearly 2 million farmers.

We appreciate this opportunity to discuss with you an issue of great importance for farmer cooperatives. I wish to make clear at the outset that we are not here to attack the FTC. Most of the events that will be discussed in my testimony occurred years ago and are presented as background, so that you will better understand our concerns. Our purpose in being here today is to attempt to further clarify the roles of the Federal Trade Commission and the Department of Agriculture concerning their respective jurisdictions over the activities of farmer cooperatives and the administration of marketing orders.

As you know Congress debated these issues in 1979 and reaffirmed the primary jurisdiction of the Secretary of Agriculture over farmer cooperatives and marketing orders by providing in the FTC Improvements Act of 1980 that the Commission should not use any funds for the purpose of conducting any study, investigation, or prosecution of any agricultural cooperative for conduct which, because of the provisions of the Capper-Volstead Act, is not a violation of any Federal antitrust act or the Federal Trade Commission Act, or for the purpose of studying or investigating any marketing orders. These prohibitions are currently in effect under the terms of the FTC's continuing budget resolution.

The Conference Report accompanying the Improvements Act stated the conferees' desire to ratify the spirit and intent of the Capper-Volstead Act, and their belief that the rationale for the limited antitrust exemption contained in the statute is valid.

The Capper-Volstead Act provides that producers of agricultural products may act together in corporate or non-corporate associations, operated for the mutual benefit of the member producers in collectively processing, preparing for market, handling, and marketing their products. It also authorizes them to have marketing agencies in common and to make the necessary contracts and agreements to effect such purposes. Section 2 of the Act designates the Secretary of Agriculture to guard against possible abuses of Capper-Volstead by requiring the issuance of a complaint if the Secretary has reason to believe that any association monopolizes or restrains trade to such an extent that the price of any agricultural product is unduly enhanced. The Secretary is authorized to issue a cease and desist order against the association.

Cooperatives had sought restrictions on the use of FTC funds in the Improvements Act because during the early 1970's the Commission ignored the provisions of the Capper-Volstead Act and the Agricultural Marketing Agreement Act by proceeding against cooperatives and marketing orders. The costs to cooperatives, and indeed to the government, as a result of these intrusions into the jurisdiction of the Secretary of Agriculture were substantial.

As part of a study into the role of agriculture cooperatives in the economy, the Commission requested vast amounts of information from the 60 largest coops. One request was so broad that 81 pages of index were required to list all the materials supplied by the single cooperative. A 17-page subpoena was served on a Northeast dairy cooperative which was required to spend nearly 50,000 man-hours at 42 separate locations in order to collect the 29,000 documents requested.

At about the same time the FTC's office of Policy Planning and Evaluation recommended that 29 professional man-years be devoted to a detailed study of federal agricultural marketing orders for the years 1976–79 despite the fact that the marketing order program is under constant review by the Department of Agriculture and by the Senate and House Committees on Agriculture.

During this same period the FTC instituted an investigation of Ocean Spray Cranberries, Inc. which dragged on for nearly 10 years at substantial cost to the producers. Although no complaint was ever issued, the cooperative was required to expend more than $100,000 and endure years of harassment before the matter was finally closed.

In 1974 the Commission did issue a complaint against the Central California Lettuce Producers Cooperative charging price fixing, which in turn spawned private litigation against the cooperative in federal district court. The administrative action was argued twice before the Commission and was finally dismissed, but only after the district court ruled that the challenged activities were within the scope of the Capper-Volstead Act. More than a quarter of a million dollars was spent to defend the lettuce case.

Shortly afterward the Commission challenged Sunkist Growers, Inc. a citrus marketing cooperative comprised of 6,500 growers. The complaint against Sunkist included a number of allegations, but like the cranberry investigation the Commission's real objective was to attack the cooperative's share of the market. Since Capper-Volstead was intended to help farmers increase their market share the *Sun-*

kist case put the FTC on a true collision course with Capper-Volstead. Sunkist attempted to challenge the Commission's asserted jurisdiction in the courts. However, after being faced with legal expenses amounting to nearly $1 million per year, Sunkist was forced to enter into a consent decree in order to settle the case. The consent decree did not even mention the serious allegations of the initial complaint.

Each of the cooperatives mentioned in the examples is organized and operated in accordance with the requirements of the Capper-Volstead Act. Yet to our knowledge the Commission never inquired of the Secretary of Agriculture or even made a specific ruling as to whether the Capper-Volstead Act provided immunity prior to initiating the studies or issuing the complaints.

These activities provided the backdrop for the efforts by cooperatives to convince Congress to restrain the FTC from interfering with marketing orders and with the rights conferred by Capper-Volstead, and culminated in passage of the FTC Improvements Act of 1980. However, not long after passage of the Improvements Act the Commission issued a complaint against Dairymen, Inc. in connection with its acquisition of Farmbest Foods. The Commission made no effort to justify its assertion of jurisdiction and once again farmers are incurring staggering legal fees while wondering what happened to the protection afforded them by the Capper-Volstead Act and the FTC Improvements Act.

The Dairymen, Inc. complaint points out an inherent weakness in the FTC Improvements Act language which allows the Commission to ignore the admonition of Congress to refrain from pursuing conduct immunized by Capper-Volstead if it chooses to do so.

We do not believe Congress intended that the FTC only be required to pay lip-service to the limitations contained in the Improvements Act. The Conference Report clearly indicates that the protections afforded cooperatives by Capper-Volstead are legitimate and necessary, and that the FTC should not impose additional layers of authority in an area where the Secretary of Agriculture and the Department of Justice already have primary jurisdiction to prohibit illegal conduct.

What the *Dairymen, Inc.* case illustrates is that once the FTC decides to proceed with an investigation or issue a complaint against a cooperative there is no effective way for the cooperative to assert its right to Capper-Volstead protection until after it has incurred substantial legal expenses. Furthermore, once a matter is "in litigation" the oversight committees of Congress are reluctant to interfere no matter how meritorious a defense the cooperative might have.

For these reasons the National Council supported the amendment sponsored last year by Senator Kasten and adopted by this committee which would have prohibited FTC from studying, investigating, or prosecuting an agricultural cooperative that meets the requirements of the Capper-Volstead Act until the Secretary of Agriculture has made a final determination that the acts or transactions in question are outside the scope of the Capper-Volstead Act. The basis for the Kasten Amendment is found in the legislative history of the Capper-Volstead Act.

Capper-Volstead is remedial legislation designed to protect farmers who choose to market their crops through cooperative associations from being prosecuted for conduct that would otherwise be regarded as a violation of the antitrust laws. Section 1 of Capper-Volstead allows producers of agricultural products to act together in associations and to engage in a number of collective activities for the mutual benefit of the members. During the Congressional debates, Congress pondered the possible results of this special treatment for farmers under the antitrust laws and concluded that some safeguards should be written into the law to provide remedies in the event of abuse. Thus, section 2 of Capper-Volstead was enacted.

The legislative history brings into sharp focus the fact that Congress specifically considered the question of whether to place Section 2 authority with the Secretary of Agriculture or in the Federal Trade Commission. When the measure which passed the House of Representatives reached the Senate floor an attempt was made to substitute the words "Federal Trade Commission" for the words "Secretary of Agriculture" and the floor debates contain pointed arguments in support of both versions. When the vote was taken, the Senate affirmed the House versions and refused to place the authority in the FTC.

Because Capper-Volstead was remedial legislation its purpose was to grant antitrust relief to farmers who were threatened with antitrust prosecutions. Congress was not seeking to add a third government agency to supplement existing authority of the Department of Justice and the FTC. Instead it was seeking to immunize and protect farmers from antitrust prosecution for conduct falling within the scope of Capper-Volstead. It deliberately chose the Department of Agriculture to guard against abuse of the exemption, not the FTC.

The FTC Improvements Act reaffirmed this Congessional intent and clearly limited the role of the Commission with regard to marketing orders and cooperatives. However, the Dairymen, Inc. complaint demonstrates that cooperatives have little if any protection from FTC harassment if the Commission decides to proceed without a meaningful determination as to whether Capper-Volstead affords immunity. For this reason the National Council supports the approach taken by the Kasten Amendment which would prevent the Commission from studying, investigating or prosecuting any agricultural cooperative until the Secretary of Agriculture has determined that the acts or transactions are outside the scope of the Capper-Volstead Act.

We also urge you to retain the prohibitions against FTC study, or investigation of marketing orders. FTC involvement in this area would be duplicative and costly. Responsibility for oversight and inforcement of marketing orders rests with the Secretary of Agriculture under the provisions of the Agricultural Marketing Agreement Act of 1937. The Act authorizes the Secretary to enter into marketing agreements with handlers, processors and producers of any agricultural commodity. In the fresh fruit and vegetable industry these orders control the flow of designated commodities to market and provide for inspection, size and grade requirements, marketing and research projects and other requirements. In the dairy industry, orders are also used to set minimum prices that handlers are required to pay for milk.

The Department of Agriculture has the necessary expertise and trained personnel to monitor and enforce these marketing order programs. There is no need for the FTC to expend funds to duplicate these efforts. In addition, the House and Senate Committees regularly review the marketing order program as part of their oversight responsibilities.

Mr. Chairman, The National Council urges you to report a reauthorization bill for the Federal Trade Commission that prohibits the use of FTC funds for the purpose of conducting any study or investigation of any agricultural marketing orders, and which prohibits any study, investigation or prosecution of any agricultural cooperative unless the Secretary of Agriculture has made a final determination, as spelled out in the Kasten amendment, that the acts or transactions are outside the scope of immunity conferred by the Capper-Volstead Act. We are pleased to have this opportunity to testfy and we will attempt to answer any questions the committee may have.

[The following information was subsequently received for the record:]

National Council of Farmer Cooperatives,
Washington, D.C., March 23, 1983.

Hon. Bob Packwood,
U.S. Senate, Russell Senate Office Building,
Washington, D.C.

Dear Senator Packwood: I am writing to thank you again for the opportunity to testify at the hearing held March 16, 1983 to consider authorization for the Federal Trade Commission. I would also like to clarify an issue which came up during the question and answer period following Chairman Miller's statement. You commented that when Capper-Volstead was passed, few people envisioned what cooperatives would become, since during the time of passage cooperatives were small business enterprises.

The belief that Coungress only intended to assist small cooperatives is a misconception held by many people. However, as the enclosed article from USDA's Farmer Cooperative publication demonstrates, Congress was aware at the time of the dedate over Capper-Volstead that several farmer cooperative associations had substantial shares of market. The acticle points out that during the period 1913–1923 there were a number of cooperatives with dominant positions in the market. Some examples Include:

California Fruit Growers Exchange (now Sunkist Growers, Inc.) which shipped from 61.5 percent up to 76.0 percent of the total number of railroad cars of citrus from the state of California during the period. In 1921, these shipments had an F.O.B. value of $61 million.

Sun-Maid Raisin Growers of California had a market share ranging from 78 percent up to 89.7 percent of the total U.S. output of raisins during the period 1913 through 1922. In 1920, gross sales were in excess of $44 million.

As the article indicates these were not isolated instances. There were also large farmer cooperative associations in commodities such as tobacco, fruits, grain, livestock and dairy. The legislative history of Capper-Volstead contains numerous pointed references to these large cooperatives.

Although time did not permit a thorough discussion of this matter during the hearings, I was sure you would like to have the information prior to your further consideration of the FTC bill. Your staff has been provided a copy of the USDA study which contains the background information used in the Farmer Cooperative article.

Sincerely,

JAMES S. KRZYMINSKI,
Acting President.

NATIONAL COUNCIL OF FARMER COOPERATIVES,
Washington, D.C., April 15, 1983.

Hon. BOB PACKWOOD,
U.S. Senate, Russell Senate Office Building,
Washington, D.C.

DEAR SENATOR PACKWOOD: This is in answer to your letter of March 28, 1983, requesting our response to a question from the minority members of the Committee on Commerce, Science, and Transportation regarding Federal Trade Commission Reauthorization. The question posed was: "If we require the FTC to obtain a clearance from the Secretary of Agriculture before proceeding with an antitrust complaint should time limits be placed on that?"

As you know, the National Council supported the amendment sponsored last year by Senator Kasten and adopted by the Committee which, in part, would have prohibited the FTC from studying, investigating, or prosecuting any agricultural cooperative that meets the requirements of the Capper-Volstead Act until the Secretary of Agriculture has made a final determination that the acts or transactions in question are outside the scope of the Capper-Volstead Act.

During the last several months of 1982, the National Council staff visited the offices of a number of Senators interested in this issue. Two principle areas of concern were raised during these discussions. First, it was alleged the Kasten amendment would interfere with ongoing litigation. Secondly, it was felt USDA would be able to unnecessarily delay FTC action if a time limit were not placed on their review.

In order to address those legitimate concerns we drafted a suggested amendment to the Kasten language, which we believe would make it more workable. A copy of this suggested amendment is attached.

The proposal would make the following modifications:

(1) The amendment would not apply to any prosecution or proceeding pending on the date of enactment, and (2) the Secretary of Agriculture would be required to make his determination of the applicability of Capper-Volstead within 60 days, with a possible 30 day extension if necessary.

We believe this approach satisfies the major objections which have been raised and urge the Committee's favorable consideration. If we can be of further assistance in answering any other questions, please let me know.

Sincerely,

JAMES S. KRZYMINSKI,
Acting President.

AMENDMENT TO THE FEDERAL TRADE COMMISSION AUTHORIZATION BILL

Amend section 12 of the bill to read as follows:

AGRICULTURAL COOPERATIVES

SEC. 12. Section 5(a) of the Federal Trade Commission Act (15 U.S.C. 45(a)) is amended by adding at the end thereof the following new paragraph:

"(3)(A) The Commission shall have no authority to—

"(i) conduct any study or investigation of any agricultural marketing orders; or

"(ii) conduct any study, investigation, or prosecution of any agricultural cooperative which meets the requirements of the Act entitled 'An Act to authorize association of producers of agricultural products', approved February 18, 1922 (7 U.S.C. 291–293), commonly known as the Capper-Volstead Act unless the Secretary of Agriculture after consideration of any comments submitted by the Commission has made a final determination that the acts or transactions in question are outside the scope of the immunity conferred by the Capper-Volstead Act, or section 6 of the Clayton Act (15

U.S.C. 17), provided however, that this subparagraph shall not apply to any prosecution or proceeding pending on the date of enactment of this Act.

"(a) Within 60 days after receiving notice that the Commission intends to study, investigate, or prosecute any agricultural cooperative, the Secretary of Agriculture shall publish any determination made under this subparagraph in the Federal Register, and shall simultaneously transmit his determination to the Commission. Upon finding of good cause, the Secretary may extend the 60 day period for an additional period of 30 days.

"(b) Any affected party may, within 30 days after the date of the determination of the Secretary of Agriculture, seek review of such determination in the federal district court in any district in which such party has an office or does business.".

The CHAIRMAN. Thank you.

Mr. Randall?

Mr. RANDALL. Thank you.

We want to express our appreciation for the very professional way your staff, both the majority and the minority, have dealt with our issue.

The NIDA is the largest trade association of independent dairy processors, distributors, and manufacturers of all varieties of dairy products. Members are predominantly small businesses, and many are family-owned. We are an essential link in the industry. We provide markets for the fluid milk produced by thousands of dairy farmers, whether they market independently or through their cooperatives.

NIDA members compete in the sale of their products with national processors, chains, and large regional processors. We seek equity in the processing, manufacturing, and marketing of fluid milk, cheese, and other dairy products and allied foods.

There must be freedom to compete as fairly as possible with a minimum of restraint. Members are subject to increasing restraints imposed by a combination of cooperative monopolies and governmental regulations.

The cooperatives assert that they are farmer-owned. In fact, they are giant corporations. While their public owners are farmers, they are the only publicly held corporations whose books, records, and operations are shielded in secrecy by management and by USDA's Federal cooperative service. It is almost impossible to obtain information on their gross sales or relative market positions.

We believe even the Congress does not have sufficient information to determine whether these corporate cooperatives are achieving monopoly power. While shielded from the antitrust laws, many of these corporate cooperatives market substantial quantities of products containing nonagricultural products. Artificial cheese, soft drinks, sherbert, ice cream, ice milk, and others are just examples.

They market these in competition with proprietary taxpaying businesses who are subject to the antitrust laws. Over-order premiums—those are prices in addition to or higher than the Federal order prices—charged by these co-ops demonstrate the raw market power, monopoly power of these corporations.

These prices charged to the public do not go back to the farmers, according to USDA's former Director of the Dairy Division, Herb Forester. They are used by the co-ops to subsidize their often inefficient operations and to eliminate competition.

According to a University of Wisconsin study, R3191, a copy of which we have—a summary of which we have included, a majority of the Federal farm assistance through the market orders which are dominated by the co-ops and through the CCC purchases go to minority—to a minority of the farmers. Those farmers are the huge corporate farmers, not the small, independent farmer of the twenties, the thirties, the forties, or even the sixties.

The farmer cooperative domination of the Federal orders has resulted in a reduction in the consumption of milk. This behavior has been quite similar to that of the OPEC oil cartel. They have raised prices and oil consumption fell. We question whether the current policies favoring dairy cooperatives is the most cost-effective means of assuring an adequate milk supply and of aiding our Nation's farmers.

NIDA strongly recommends to the subcommittee that it continue the antitrust authority in the Federal Trade Commission and its present application to the agricultural cooperative. NIDA opposes any removal of FTC's current antitrust authority over agricultural cooperatives as this would have a destructive effect on competition that still remains.

Since 1960, independent dairies have declined in number from 7,000 to about 1,000 today. NIDA's position is that the FTC should have the necessary antitrust and trade practices authority, consistent with the Clayton Act, the Capper-Volstead Act, the Agricultural Marketing Acts, and the right under the FTC Act to take action against illegal conduct or practices of cooperatives separately or in federations or in connection with any governmental program.

NIDA absolutely opposes the creation of any new antitrust immunity or enlargement of the existing antitrust immunity of agricultural cooperatives or the creation of any prior review and consent or primary jurisdiction in the Secretary of Agriculture over the FTC's action or proposed actions.

Thank you, sir.

[The statement follows:]

STATEMENT OF DONALD A. RANDALL, EXECUTIVE VICE PRESIDENT AND GENERAL COUNSEL, NATIONAL INDEPENDENT DAIRY-FOODS ASSOCIATION

The National Independent Dairy-Foods Association (NIDA) is the trade association of independent dairy processors, distributors, and manufacturers of all varieties of dairy products. We are the largest organization of independent companies with a nationwide membership. Members are predominantly small businesses and many are family owned. Our members are an essential link in the industry. We provide the markets for the fluid milk produced by thousands of dairy farmers, whether they market independently or through their cooperatives.

NIDA members compete in the sale of their products with national processors, chains, and large regional cooperative processors. Our members, through NIDA, seek to gain equity in the processing, manufacturing and marketing of fluid milk, cheese, and other dairy producers and allied foods. NIDA's members want a marketplace with as much freedom to compete as fairly as possible, with a minimum of restraints. Members are subject to increasing restraints imposed by a combination of cooperative monopolies, and governmental regulations.

NIDA strongly recommends to the Subcommittee that it continue the antitrust authority in the Federal Trade Commission, and its present application to agricultural cooperatives.

NIDA opposes any removal of FTC's current antitrust authority over agricultural cooperatives, as this would have a destructive effect on competition.

NIDA's position is that the FTC should have the necessary antitrust and trade practices authority consistent with the Capper-Volstead Act, the Agricultural Marketing Acts, the Clayton Act, and the FTC Act, as amended, to take action in regard to illegal conduct or practices of cooperatives, separately or in Federations or in connection with any governmental program.

NIDA absolutely opposes the creation of any new antitrust immunity or the enlargement of any existing antitrust immunity for agricultural cooperatives, or the creation of any prior review and consent or primary jurisdiction in the Secretary of Agriculture over any FTC actions or proposed actions.

The FTC has a unique function in antitrust enforcement. Traditionally, small businesses have looked to FTC for the types of enforcement actions needed to preserve basic markets and rid them of trade restraining practices. The dairy industry of today is a good example of an industry where independent businesses are saddled with trade restraints and monopoly practices engaged in by regional dairy cooperatives. Many firms have been forced out of business. Many survivors have been rendered weak and near failure. Since 1960 the number of independent dairies has declined from approximately 7,000 to about 1,000.

Let us look at the causes of some of the industry problems and maybe we can see why we think the FTC has a continuing, vital role. The unhealthy competitive situation is partly the result of policies of Congress and the Department of Agriculture. During the past 45 years Congress has consistently followed the policy of restricting competition through market orders and promoting the growth of agricultural cooperatives, often at the expense of the small proprietary businesses. The Department of Agriculture diligently carries out these policies. During the past 25 years the FTC has followed a special merger and acquisition policy for the dairy industry which has been directed against national and regional corporations. It has fostered an unbridled merger trend among cooperatives. Also, during the same periods of time, there have been substantial technological, organizational and structural changes in the industry. Regional cooperatives have dominated the fluid milk supply in federal orders and entire regions of the country with supply averages between 85 and 100 percent. They have moved aggressively into processing, manufacturing, and distributing, filling the vacuum created by FTC enforcement against the proprietary side of the industry. The chain stores have invested heavily in the processing business. Over capacity has resulted. The plight of the independent dairy businesses was highlighted in a 1976 study: "The FTC merger policy toward the fluid milk processing industry must be viewed within the changing structure of the industry. When the FTC initiated its first merger complaint in 1956, the industry was experiencing drastic organizational changes. During the decade of the 1950's the number of fluid milk processors declined from 8,185 to 5,328. This decline has continued, and by 1974 there were 1,619 fluid milk processors or only 20 percent as many as in 1950. "In large part this decline reflected growing economies of scale in processing fluid milk. Based on our analysis, we believe that fewer than 500 fluid milk processors will survive as viable competitors over the next decade. This means that over 1,000 fluid milk processors operating today are still too small to participate as viable long-term competitors. Although some of these may grow into the ranks of viable firms, most will disappear either through liquidation or acquisition by larger units." (Public Policy Toward Mergers In The Dairy Processing Industry, December 1976, N.C. Project 117, Un. of Wisc.)

NIDA believes that the role of the FTC as an independent antitrust agency must be pursued in agriculture. True, the FTC has played a very limited role. It is not the radical body which its enemies have asserted over the years. FTC cases involving cooperatives have been few and far between. Nevertheless, its continued authority is essential in the dairy industry.

The few recent FTC actions have, and are, providing a little help to an industry which has seen thousands of small independent businesses lost to the powerful forces of regional cooperatives, national retail chains, and excessive market order regulations. USDA seeks to reduce or eliminate competition among farmers. Reduced competition in the dairy industry has been achieved at the expense of small businessmen and the consumer. This limited FTC authority over agriculture cooperatives must not be subordinated to the Secretary of Agriculture. The Secretary's power is being used to encourage the growth of multi-state dairy cooperatives while discouraging the independent cooperative, dairy farmer and handler. It is creating insurmountable barriers to competition by independent proprietary dairy processors.

The FTC has challenged monopoly in *FTC* v. *Sunkist Growers Inc.* FTC DKT 9100; (*Sunkist* v. *FTC*, (1979-1) Tr. Cases § 62,469; 464 F. Supp. 302) in the California markets for fresh lemons, oranges, and lemon products through the use of restrictive agreements and exclusive dealing contracts with packing houses. In the dairy industry, FTC currently is evaluating the settlement of the case against Dairymen, Inc. It involves the powerful Southeastern Dairy Cooperative's acquisition of a major non co-op competitor, Farmbest Foods, Inc. *FTC* v. *Dairymen, Inc., and Mumford, Inc.* DKT 9143. In this action the issue of FTC's jurisdiction and procedure has been upheld by the Courts (U.S.D.C., KY). Its right to proceed normally, without being unnecessarily burdened by a misapplication of section 20(a) of the FTC Improvements Act of 1980, has been upheld. Neither of these FTC actions is or was a threat to the survival of these cooperatives. Both are multibillion dollar corporations. The FTC has never challenged any agri-cooperative for serving the true interests of its members in the exercise of lawful business practices. In fact, Dairymen, Inc., which was created by mergers and has grown by acquisitions into a billion dollar corporation, has during the FTC settlement proceedings, made more acquisitions.

An example of FTC action in 1982 is in the matter of *Western General Dairies, Inc.*, (consent order to cease and desist, File No. 7610004, February 22, 1982). The FTC acted to halt the destruction of competition in the dairy industry in the mountain states. The consent order simply requires fair business practices. Western General Dairies, a dairy cooperative, agreed to change its contracts to permit a member to sell raw milk after leaving the association. The cooperative will also offer nondiscriminatory prices and services to all of its raw milk and dairy product customers.

The National Farmers Organization case has a long history of litigation in the Midwest and is now on petition to the Supreme Court. It contains valuable lessons on the antitrust violations by agricultural cooperatives.

In the Eighth Circuit Court of Appeals opinion in *Alexander* v. *National Farmers Organization*, (687 F2d 1173) decided August 31, 1982, the extent of the abuse of the Capper-Volstead Act exemption for agricultural cooperatives is demonstrated. The Court found that three dairy cooperatives used many unlawful tactics against NFO, a competitor co-op. The Court said: "When the conduct is viewed as a whole, however, there is only one conclusion that can be drawn. AMPI, Mid-Am and CMPC did conspire to monopolize and eliminate competition in the marketing of Grade A milk produced in the Midwest, through the use of discriminatory pricing, coercive supply disruptions and threats of similar conduct, as well as bad faith harassment and threats of litigation against independent buyers of NFO milk . . . The foregoing pattern of conduct establishes that Mid-Am, AMPI, and CMPC conspired to gain control over milk marketing and to eliminate competition through unlawful practices."

This case also demonstrates that the costs of private lawsuits under the Clayton Act where agricultural cooperatives are defendants, are excessive, and nearly impossible for small independent processors who regularly are the targets of some of these super regional corporate cooperatives. They are a crushing burden to all—even large corporations or other large cooperatives. The Petition For a Writ of Certiorari filed by the plaintiff, NFO, illustrates the problem. "For twelve years, NFO has been defending itself against the defendant's multiple oppressive litigation tactics, and is at last on the brink of total victory in resisting these claims, but the cost of defense has been enormous. NFO's legal defense costs alone exceeded $2,000,000 by 1978."

These costs are so burdensome that even the victor, NFO, who will recover damages, must petition the Supreme Court on the issue of costs of litigation as part of those damages, which the 8th Circuit Court denied.

There is no question, that the FTC authority to proceed without strings tied, is an incalculable aid to victims of law violations, whether or not those victims are independent farmers or processors, or large conglomerate cooperatives or corporations.

NIDA would like to point out to the Subcommittee that there are a number of major consent orders restraining the largest regional cooperatives from certain practices which are unlawful, and these orders of U.S. District Courts are expiring due to the time limits. This is no time to retire the FTC from this area of the law. As NIDA recently commented to the FTC on its proposed changes to its dairy industry merger guidelines. "Finally, NIDA is concerned with the time limits in the orders to which the major dairy cooperatives are now subject. The order in Mid-America Dairymen barred anticompetitive acquisitions or mergers for five years from May, 1977 (1971 Trade Cas. 61,509, page 71,984); in AMPI it requires prior approval for ten years from April 1975 (1975 Trade Cas. 60,327, page 66,345; and in *U.S.* v. *Agri-Mark, Inc.*, the order requires prior approval for five years from April 1981 (1981 Trade Case. 63,967, page 76,011). The terms of settlement in *FTC* v. *Dairymen, Inc.*, as to future acquisitions will be extremely important as this cooperative's acquisitions require pages to list in the Justice and FTC complaints."

In conclusion, NIDA raises three other matters of concern in keeping the FTC's authority over agricultural antitrust and trade practices in tact.

First, there are an alarming number of joint ventures or joint operating agreements being used by cooperatives to avoid consent orders and the antitrust laws.

Second, interfering with FTC authority under Section 5 may destroy the effectiveness of Hart-Scott-Rodino Act merger reporting.

Third, NIDA has grave concerns that private antitrust actions under certain Sections of the Clayton Act may be barred or seriously impaired by further weakening of FTC authority in the area of agricultural cooperatives.

We have attached a brief list-comparison of some advantages enjoyed by cooperatives over independent processors, which affected one of NIDA's members. We also include a copy of NIDA's letter to Thomas Campbell of the FTC, outlining our position on this legislation.

Thank you. We will be pleased to try to answer your questions.

ATTACHMENTS

Federal and State laws and regulations give dairy cooperatives in Pennsylvania numerous advantages in the areas of taxation, loan agreements, etc., which proprietary companies like ours do not have. As a result, private companies have been going out of business while milk farmers' cooperatives have been expanding into the processing area.

Let's compare a private company with a cooperative:

	Cooperative	Private company
Federal income taxes	Exempt	48 percent of profits.
Pennsylvania income tax	4 percent of profit	10½ percent of profit.
Pennsylvania stock tax	None	1 percent.
Sales and use tax:		
Vehicles	6 percent	6 percent.
All other	Exempt	Exempt on dairy processing equipment only.
Unemployment compensation	Exempt	3.55 percent on first $6,300 (Pa) 1.6 percent on first $6,000 (Federal).
Pennsylvania Farmers' Security Fund	Not required	1 cent per cwt. of milk, or a bond.
Loans from banks	Banks for Co-ops—lower interest rates	Commercial banks—prime rates.
Payment of interest	Can be forgiven	Must pay.
Amount of loans	Banks for co-ops less restrictive	Limited to strength of financial statements and profit record.
Federal milk marketing advertising fund paid by farmers.	May request refunds for members to advertise its products.	Pays own advertising.
Financial losses	Assesses members through deductions from milk checks.	Sustains losses, or goes out of business.
Price of milk paid farmers	By averaging all purchases, can pay less than full classified prices.	Must pay full classified prices.
Penalty for late payment of milk receipts	No penalty	1 percent of balance due per month.
Antitrust laws	Exempt from restrictions in mergers, and permitted to fix prices as well as charge premims.	Strict enforcement of antitrust laws.
Dividends to stockholders	None	Must pay return on investment or lose investors.

So you see, more than just wages are involved in the cost of a product and the competition to sell it.

NATIONAL INDEPENDENT DAIRY-FOODS ASSOCIATION,
Washington, D.C., February 23, 1983.

Mr. THOMAS J. CAMPBELL,
Director, Bureau of Competition,
Federal Trade Commission
Washington, D.C.

DEAR MR. CAMPBELL: I appreciated the opportunity to discuss with you yesterday the negotiations that are underway between the Commission and the agricultural cooperative industry on the Ag Coop amendment in the FTC Authorization Bill. As a representative of independent dairy processors and distributors, we have become increasingly concerned about the decided trend towards greater concentration among suppliers of raw dairy products. Our economic future is dependent upon a reliable source of supply in a marketplace disciplined by vigorous competition. It is, therefore, in our long-term interest, and in the interest of the consumers of this nation, that the FTC's competence, expertise, objectivity, and legal ability to assure fair dealing in this segment of the economy be maintained.

In furtherance of these concerns, our legislative activities over the past four years have been guided by the following objectives which we hope you will adhere to in your negotiations with the agricultural cooperatives:

First, while the existing limitations on the Commission's authority to conduct studies, investigations, or prosecutions of agricultural cooperatives were never justified, they should certainly not be expanded in any subsequent legislation. However, if for political reasons it becomes necessary to retain the existing limitations, the extension should be only for the life of the authorization; they should not become permanent fixtures in the statute.

Second, we opposed the current provision prohibiting the Commission from conducting any studies or investigations of agricultural marketing orders. Again, no reasonable basis for creating this limitation was ever established by the Congress. At a minimum, the Commission should retain the ability to conduct a study or investigation of an agricultural marketing order when such order may be a material factor in conduct which violates the antitrust or consumer protection laws.

Third, in view of the fact that Congress has not for many years examined the applicability and effectiveness of the antitrust laws with respect to agricultural cooperatives, legislation should direct the Commission to undertake a study, the results of which should be submitted to Congress in one year. The study should examine the activities of the FTC with respect to agricultural cooperatives for the last ten years and (1) define the nature and scope of the Commission's authority in this area prior to the enactment of Section 20 of Public Law 96-252 and (2) describe any studies, investigations, or prosecutions of any agricultural cooperatives or any studies or investigations of agricultural marketing orders undertaken by the Commission within this period. In addition, the study should examine the offensive and defensive private use of the antitrust laws as such use relates to agricultural cooperatives, with a summary of the major cases over the past decade and their findings. With this two-pronged study in hand, Congress will be in a better position to determine whether any permanent changes regarding the relationship between the antitrust laws and agricultural cooperatives are warranted.

Section 12 of S.2499 as reported by the Senate Committee on Commerce, Science and Transportation, was highly objectionable for a myriad of reasons. Indeed, we believe that it would have effectively precluded the FTC from applying to agricultural cooperatives those aspects of the antitrust and consumer protection laws which are outside the scope of the Capper-Volstead exemption and to which all other businesses are subject. It would have given an executive branch official veto power over the law enforcement decisions and activities of an independent regulatory agency. The Secretary of Agriculture, who lacks antitrust expertise and other antitrust law enforcement responsibilities, would have been in a position to prevent the FTC from acting simply by withholding the final determination required under the provision. Moreover, even if the Secretary had acted, the ability of any affected party to seek judicial review of the Secretary's decision would have guaranteed endless delay, thus inhibiting the Commission's ability to take prompt action where necessary. While we do not believe it is necessary, NIDA would not oppose a provision which simply requires the FTC to notify the Secretary of Agriculture prior to proceeding with an investigation, study, or prosecution of an agricultural cooperative. However, no other interference with the FTC's authority is warranted.

I hope that this letter clarifies our position with respect to this legislation and I would, of course, be willing to expand upon these views should you so request.

Thank you for your kind attention.

Sincerely,

Donald A. Randall,
Executive Vice President/General Counsel.

FEDERAL ORDER CLASS I PRICES AND ANNOUNCED COOPERATIVE CLASS I PRICES IN SELECTED CITIES, JANUARY 1983–JUNE 1983[1]

[Dollars per hundredweight]

City	January 1983		February 1983		March 1983[2]		April 1983	
	Federal Order	Coop.	Federal Order	Coop.	Federal Order	Coop.	Federal Order	Coop.
Atlanta, GA	14.86	16.05	14.92	16.05	14.92	16.05	14.89	[2]1.13
Baltimore, MD	15.34	15.49	15.40	15.55	15.40	15.55	15.37	....

FEDERAL ORDER CLASS I PRICES AND ANNOUNCED COOPERATIVE CLASS I PRICES IN SELECTED CITIES, JANUARY 1983–JUNE 1983[1]—Continued

[Dollars per hundredweight]

City	January 1983		February 1983		March 1983[2]		April 1983	
	Federal Order	Coop.	Federal Order	Coop.	Federal Order	Coop.	Federal Order	Coop.
Boston, MA	15.56	15.80	15.62	15.86	15.62	15.86	15.59	....
Carbondale, IL	14.16	15.01	14.22	15.01	14.22	15.01	14.19	....
Chicago, IL	13.82	14.64	13.88	14.64	13.88	14.64	13.85	....
Cincinnati, OH	14.26	14.87	14.32	14.88	14.32	14.88	14.29	....
Cleveland, OH	14.49	14.95	14.55	14.96	14.55	14.96	14.52	....
Dallas, TX	14.88	15.45	14.94	15.45	14.94	15.45	14.91	....
Denver, CO	14.86	15.58	14.92	15.59	14.92	15.59	14.89	....
Des Moines, IA	13.96	14.60	14.02	14.60	14.02	14.60	13.99	....
Detroit, MI	14.26	14.92	14.32	14.93	14.32	14.93	14.29	....
Hartford, CT	15.46	15.70	15.52	15.76	15.52	15.76	15.49	....
Houston, TX	15.24	16.07	15.30	16.07	15.30	16.07	15.27	....
Indianapolis, IN	14.09	14.75	14.15	14.76	14.15	14.76	14.12	....
Kansas City, MO	14.30	15.09	14.36	15.09	14.36	15.09	14.33	....
Little Rock, AR	14.50	15.24	14.56	15.24	14.56	15.24	14.53	....
Louisville, KY	14.26	15.15	14.32	15.15	14.32	15.15	14.29	.83
Miami, FL	15.71	17.20	15.77	17.20	15.77	17.20	15.74	....
Milwaukee, WI	13.73	14.55	13.79	14.55	13.79	14.55	13.76	.76
Minneapolis, MN	13.68	14.11	13.74	14.11	13.74	14.11	13.71	....
Nashville, TN	14.41	15.30	14.47	15.30	14.47	15.30	14.44	....
New Orleans, LA	15.41	16.00	15.47	16.00	15.47	16.00	15.44	....
Oklahoma, OK	14.54	15.42	14.60	15.42	14.60	15.43	14.57	....
Omaha, NE	14.16	14.85	14.22	14.85	14.22	14.85	14.19	....
Philadelphia, PA	15.40	15.50	15.46	15.56	15.46	15.56	15.43	....
Phoenix, AZ	15.08	15.08	15.14	15.14	15.14	15.14	15.11	....
Pittsburgh, PA	14.51	14.97	14.57	14.98	14.57	14.98	14.54	....
Rock Island, IL	13.89	14.53	13.95	14.53	13.95	14.53	13.92	....
St. Louis, MO	14.16	15.01	14.22	15.01	14.22	15.01	14.19	.79
Salt Lake City, UT	14.46	14.59	14.52	14.65	14.52	14.65	14.49	....
Seattle, WA	14.41	14.71	14.47	14.77	14.47	14.77	14.44	.30
Spokane, WA	14.51	14.81	14.57	14.87	14.57	14.87	14.54	....
Springfield, MO	14.16	15.01	14.22	15.01	14.22	15.01	14.19	....
Washington, DC	15.34	15.49	15.40	15.55	15.40	15.55	15.37	....
Waterloo, IA	13.80	14.44	13.86	14.44	13.86	14.44	13.83	....
Simple Average	14.56	15.17	14.62	15.19	14.62	15.19	14.59	....

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[1] This table contains such information as can be readily obtained as to over-order class I prices announced for the beginning of the month by cooperative associations in various markets. Announced prices may be changed during the months, and are noted in the following month's report. The information relates to the major cooperative in each of the city markets and does not apply to all of the class I sales in these city markets.

[2] March premium price imposed by co-ops.

[3] GA. milk market in SC.

Note: These data are common market knowledge in the sense that the information represents basic class I price announcements by the cooperative sent to all handlers who buy milk from them. These announced over-order prices represent charges for various services performed by the cooperative. Announced prices may not include handling or service charges applicable to milk from supply plants. In some instances, the announced over-order prices are not uniform in that competitive credits may be allowed. These prices have not been verified as having been actually paid by handlers.

[From the Dairy Industry Newsletter, Feb. 25, 1983.]

DAIRY GROUPS GIVE $2.3 MILLION IN 1982 ELECTIONS; CO-OP GROUPS FAVOR DEMOCRATS

Analyses of political action committee donations to congressional candidates in the campaigns for the 1982 elections show that most dairy cooperatives tended to favor Democrats while most processors and handler groups tended to favor Republicans. While there are exceptions in both category, one factor was true in every PAC report to the Federal Election Commission: Both groups gave mostly to incumbents.

The 13 representative PACs listed here are extracted from two analyses this month in The Food & Fiber Letter, a publication of Webster Communications; DIN subscribers may obtain copies of the full stories by writing us.

Producer and co-op PAC's donated $4.98 million, agribusiness industry groups $2.1 million in two years before the election. Our selected list of dairy and food industry PACs contributed $2.3 million to congressional candidates, about 1.5 to 1 in favor of Democrats. The table shows the PAC name, total contributions, number of Democrats and amount contributed, number of GOP candidates and amount given:

Political Action Committee	Donations	D	Amount	R	Amount
Associated Milk Producers, Inc.	$943,450	190	607,700	101	335,750
Mid-America Dairymen, Inc.	469,650	167	320,200	87	149,450
Winn-Dixie Stores, Inc.	269,375	113	153,650	93	115,725
Dairymen, Inc.	222,893	99	168,733	52	54,160
Food Marketing Institute	129,127	113	66,690	109	62,167
Dart & Kraft	119,290	12	8,200	104	111,090
National Council of Farmer Co-ops	72,474	40	36,540	64	35,934
The Kroger Company	28,750	19	9,600	45	19,150
Milk Industry Foundation/IAICM	22,278	15	7,400	23	14,878
National Farmers Organization	20,765	59	16,765	14	4,000
Land O'Lakes, Inc.	17,150	25	9,300	19	7,850
Borden, Inc.	14,700	8	5,250	18	9,450
Agri-Mark, Inc.	11,850	9	4,500	11	7,350
Totals	2,344,812		1,415,428		929,204

NATIONAL INDEPENDENT DAIRY-FOODS ASSOCIATION

U.S. DAIRY BENEFIT PROGRAMS

U.S. Dairy Benefit Programs disproportionately enrich the largest--more affluent farmers. A Class 1a farmer receives 15 times the dollar benefit of the Class 5 producer.

One of the biggest problems faced by Congress in seeking new alternative dairy policies is to provide some guarantee of equity in program benefits.

For example, in a recent economic analysis of U.S. Dairy Policies it was concluded: Because dairy programs raise farm-level milk prices, benefits are concentrated among the largest milk producers. Referring to the system of federal milk orders, Fronk writes, "Even under the most generous set of assumptions . . . the average Class 5 farmer (sales between $2,500 and $4,499) receives only about $135 in program benefits while the average Class 1a farmer (sales of $100,000 or more) receives slightly over $2,000." As capital requirements continue to increase in the dairy industry, the benefits from programs that elevate farm prices will increasingly flow to the relatively well-to-do.

"Aggregative Analysis of U.S. Dairy Policy," by Patricia Hutton and Peter Helmberger (University of Wisconsin, R 3191) Fronk, D.R., "Farm Size and Regional Distribution of the Benefit Under Federal Milk Regulation," Staff Report to the FTC, 1978.

The CHAIRMAN. Thank you.

Mr. Campbell.

Mr. CAMPBELL. Mr. Chairman, thank you so much for having me today to express the views of the Bureau of Competition of the Federal Trade Commission.

The Capper-Volstead Act creates an exemption of a limited nature. I cannot emphasize this strongly enough. If you look at the legislative history of the Capper-Volstead Act, one part becomes more important than any other, and I quote from the House Judiciary report in 1921:

> It is not sought to place these associations above the law, but to grant them the same immunity from prosecution that corporations now enjoy, so that they may be able to do business successfully in competition with them.

That is the purpose of the exemption, to allow them to act as though they were corporations, just as shareholders in a corporation can agree to do business. But once formed, an agricultural cooperative is subject to the same antitrust laws for its conduct outside those aspects of its creation, for example, if it conspires with a noncooperative in order to restrain trade—the *Borden* case before the Supreme Court in 1939 decided that was not exempt under Capper-Volstead—or if it monopolizes through use of predatory practices. The Supreme Court in Maryland and Virginia felt that was outside the Capper-Volstead. Or the acquisition of a proprietary, not cooperative, agricultural company by a cooperative, just as though a business were acquiring another business, and would be subject to the antimerger law, Clayton Act, section 7.

So, this is a role for Capper-Volstead, to allow the individual farmers to agree as though they were shareholders, but once formed, the antitrust laws remain in full force, applicable to the conduct of that cooperative.

Now, the role of the Department of Agriculture is also not to be misunderstood. The focus of the Department of Agriculture under section 2 of the Capper-Volstead Act is to prevent undue price enhancement. That term finds no other representation in any other antitrust law. It is not our business or the Department of Justice's business to decide what price is undue. Indeed, the creation of that right in the Department of Agriculture is constrained by the gift of the Department of Agriculture of the concern in this area.

To the extent a cartel or cooperative is formed to lift prices, the Secretary of Agriculture must be sure that it is not done in an undue fashion, but that is the restraint beyond which you have potential for anticompetitive conduct, which is not the Secretary of Agriculture's concern. Indeed, the Supreme Court so held in 1939, and again in 1960.

Here, I must take stark contrast with Mr. Krzyminski's representation. In the Supreme Court opinion in the *Borden* case, they referred to agriculture's role as auxiliary. In the *Maryland-Virginia Milk Producers* case, 362 U.S. at 462 to 463, the contention is that this provision was intended to give the Secretary of Agriculture primary jurisdiction, and thereby exclude any prosecutions at all under the Sherman Act.

> But this Court unequivocally rejected the same contention in *United States* v. *Borden,* citation omitted, after full consideration of the same legislative history that we are now asked to review again. We adhere to the reasoning and holding of the Borden opinion on this point.

So, my first point is, there is a role to be played by the antitrust enforcement agencies in this area for those activities of cooperatives beyond those necessary to form the cooperative, which is all the Capper-Volstead intended.

Now, let us turn to what the proposed amendment to the FTC's authorization would do. Most critically, in the merger area, the Hart-Scott-Rodino Act gives the Federal Trade Commission the authority to prevent mergers from happening, not to wait for them to happen and then try to undo them, but to prevent them from happening in advance.

There are strict time periods which obtain. We have 30 days in the normal takeover in which to make an analysis if we need more information. Following obtaining such information, we have 20. If it is a cash tender offer, we must act within 15 days, and if we receive additional information, we have only 10 days.

Now, this proposal would give to the Department of Agriculture the total ability to undermine our Hart-Scott-Rodino authority. All they have to do is hold the matter for 15 days, and the merger has happened, and we cannot stop it from happening. Indeed, if they hold it for a single day, that is a loss of one out of a limited number of days we have to review under a cash-tender offer. I think that is the most serious problem with the proposal. But consider other antitrust violations besides just the merger statute.

Here, for example, where a co-op might agree with an independent to engage in predatory activity or to drive out a competitor. Forget for a moment the question of price and consider whether this is aggressive, predatory conduct. The Agriculture Secretary cannot take that into account. He is only concerned with undue enhancement to price. The Agricultural Secretary is given openended authority to delay the FTC's investigation for as long as he likes.

Indeed, it could be more serious than that. It could be an absolute veto.

One of the purposes of the Federal Trade Commission having antitrust authority was to give that important area of research, antitrust, law enforcement antitrust, in an agency not within the executive. Yet here a department within the executive, the Department of Agriculture, would be exercising the veto over whether the Federal Trade Commission, supposedly an independent agency, ought to be investigating an antitrust violation.

Finally on this point, the Department of Agriculture is not a court. It is not making its decision as a court would as a matter of law. The matter will not even get to court unless the FTC is read to be an effective party under section 3 of this proposal.

I have two final points, with the chairman's indulgence. It will take just a moment longer. Thank you, sir.

There are other FTC Act violations not even in the antitrust sphere and hence not subject to Capper-Volstead which be affected by the language of this proposal. Suppose, for example, that a dairy cooperative or any cooperative subject to Capper-Volstead engaged in false and misleading advertising. Our Bureau of Consumer Protection could not even begin to look into that until the Department of Agriculture had issued a certificate saying this matter was not protected by Capper-Volstead, though it would be clear to a first-year law student that it was not.

The collateral attack that is offered is another troubling point. Unlike any other industry, without exception, that is subject to the Federal Trade Commission's jurisdiction, in this bill, agricultural cooperatives would have the right to take an appeal and to try to interrupt the proceedings and prevent the proceedings at the Trade Commission until the Capper-Volstead immunity had been litigated.

For every other industry, it is perfectly acceptable to litigate the point with respect to the case in chief when the appeal goes forward, and I have not heard a case that this industry is so substantially different from banking, common carriers, or other industries that operate with antitrust exemptions. They take their case. If they lose it at the Federal Trade Commission, they appeal it. We have been reversed, and I have not heard the argument for a special pleading in this instance.

Finally, an extension of the current restriction, in my view, would not be advisable. We are prohibited even from studying agricultural cooperatives. Our Bureau of Economics, for example, could not provide this committee with an answer to the question if it were put, how much are consumers losing because of cooperatives, but to permit the Department of Agriculture to advise or to give us their opinion is something with which I could not quarrel.

You have heard already the testimony of the chairman of the Trade Commission as to the Commission's views on marketing orders. We have something to contribute. We would like to be able to study. But to the extent we must accept some limitation, I would urge that the limitation be no broader than the present statute.

Thank you, sir.

The CHAIRMAN. Mr. Krzyminski, let me ask a couple of questions. Do you agree the Federal Trade Commission has jurisdiction outside Capper-Volstead?

Mr. KRZYMINSKI. I agree that they do.

The CHAIRMAN. Doesn't the issue therefore become how and who determines whether or not any particular given case falls within or without Capper-Volstead?

Mr. KRZYMINSKI. That is correct.

The CHAIRMAN. You are saying the Department of Agriculture should make that decision?

Mr. KRZYMINSKI. That is right.

The CHAIRMAN. Why?

Mr. KRZYMINSKI. Because the authority under the Capper-Volstead Act was placed in the Secretary of Agriculture in section 2 of that act by Congress.

The CHAIRMAN. To determine whether or not any given act fell within the Capper-Volstead Act?

Mr. KRZYMINSKI. Well, the debates in Congress centered on the question of who is in the best position—who knew more about agricultural marketing, who was in the best position to make the economic analyses necessary to determine whether or not the Capper-Volstead Act was being complied with.

The debate centered about whether it should be the Federal Trade Commission or the Secretary of Agriculture. The feeling at that time was that the Federal Trade Commission did not have the experts on its staff who understood the unique economic circumstances relating to agriculture and I do not think that has changed today.

The CHAIRMAN. What you are saying is, regardless of what may have been intended, if it is not clear we should now clarify it and the law should say that the Secretary of Agriculture will make that initial decision.

Mr. KRZYMINSKI. I think it was clearer than that. When I said that in my personal opinion the FTC did have jurisdiction over areas outside Capper-Volstead, I was not basing that on my reading of the legislative history. I think the legislative history went much further than that. I think it was much broader.

It did not really address it in terms of falling within or outside of Capper-Volstead. It simply looked at the FTC and USDA and decided that this is an area that the Secretary of Agriculture ought to be regulating. I think it must be remembered that the Capper-Volstead Act was remedial legislation.

The intention was——

The CHAIRMAN. Let me ask you this. If you were that sure that that is what the law is, then you need no change in the law.

Mr. KRZYMINSKI. We need no change in the law if the law is going to be followed by the Commission, we do not need a change.

The CHAIRMAN. If the law is as clear as what you say it is, the court will find that conclusion and keep the FTC out of these cases, won't it?

Mr. KRZYMINSKI. Well, the problem, Senator, is that is exactly what we thought was going to happen with the *Sunkist* litigation several years ago. It was really a case of first impression. The FTC went after Sunkist and the issue in that case in the district court was has the FTC gone beyond its authority and do they have no jurisdiction whatsoever.

The CHAIRMAN. And the court held what?

Mr. KRZYMINSKI. The district court held in favor of the Commission. It went up on appeal and it became moot at that point because Sunkist was forced to settle the case.

The CHAIRMAN. I understand that. What you are saying is the law is not all that clear and that you are not satisfied to rest on what may be an ultimate court interpretation of whether or not the Federal Trade Commission has this power. You want to exclude it by statute now in case it has not been excluded before.

Mr. KRZYMINSKI. Well, I am not so certain that the Kasten amendment really goes beyond the scope of Capper-Volstead. I think the Kasten amendment might actually be moving toward some middle ground.

The CHAIRMAN. If it does not go beyond it, why do you need it?

Mr. KRZYMINSKI. Because we cannot live with these law suits that are coming out of the FTC. That *Sunkist* case was costing the cooperative over $1 million a year.

The CHAIRMAN. Why don't we just let one of these cases eventually go to the Supreme Court and we will let them decide in that case what the law says?

Mr. KRZYMINSKI. That may happen, Senator. I am certain that if we do not have something like the Kasten amendment that is likely to happen and it will be very expensive to farmers.

The CHAIRMAN. As I understand what you want, it is for this Congress to reaffirm what you think Capper-Volstead says, which is the FTC has no jurisdiction, but in case Capper-Volstead did not say that you want to say it now.

Mr. KRZYMINSKI. That is what the Andrews amendment would have done. When the Improvements Act was worked out in conference, the Andrews amendment was modified so that rather than being a complete prohibition against the FTC looking at any cooperative for any reason, it was directed toward activities that fell outside the scope of Capper-Volstead.

That is what the situation was right before the Dairymen complaint was filed. Our concern at that point was we thought when the Improvements Act was adopted, as you recall, we were not advocating the compromise. We were advocating the Andrews amendment, which we thought was a real affirmation of what the Capper-Volstead Act had intended. We ended up getting the Improvements Act because it was a compromise, and that is what Congress decided to do at that point in time.

The **Chairman**. What other precedents are there for any independent agency having to submit a jurisdictional question to an executive branch agency?

Mr. **Krzyminski**. I am not sure it is precisely the same thing, but there is a provision in the Packers and Stockyard Act that sort of divides up the jurisdiction between the Secretary of Agriculture and the Federal Trade Commission, depending on whether it is an activity, an action, that involves livestock marketing agencies and so forth, packing plants, or whether it is something related to retailing.

I do not know that that specifically gets to the question you are asking, but——

The **Chairman**. If the FTC wants to pursue a suit, do they have to ask the Secretary of Agriculture whether it falls within or without the jurisdiction, as he sees it?

Mr. **Krzyminski**. They are getting into these areas through a collateral investigation of some type that happens to shed some light on an activity that falls within the Secretary's jurisdiction. Then they must come to the Secretary and they must ask the Secretary if the Secretary is doing any investigation in this area before they can proceed.

The **Chairman**. So I do not sense that the FTC is saying they want the right to delve into the internal affairs—correct me if I am wrong, Mr. Campbell—the internal affairs solely of a co-op if the co-op is acting as a co-op and doing nothing else. Mr. Campbell, you are not suggesting you will do anything about it, are you?

Mr. **Campbell**. I surely am not.

The **Chairman**. It is only when they are acting secondarily with some other business organization not a co-op.

Mr. **Campbell**. Exactly. If a co-op were to acquire an automobile company, I have no idea why Capper-Volstead would exclude jurisdiction of the Federal Trade Commission.

The **Chairman**. As I understand it, Mr. Krzyminski, your amendment, the Kasten amendment, precludes FIC action unless we go through the whole hierarchy of the Secretary of Agriculture, his decision, appeal from his decision, on up through the Supreme Court and back again; is that right?

Mr. **Krzyminski**. That is correct. Could I give you one other example and then maybe you will understand the concern we have a little better.

A few years back there was a case in the ninth circuit that involved two bargaining associations which in effect had formed a marketing agency in common, which is permitted under the Capper-Volstead Act. The activities were challenged by some proprietary concerns and the court found that this activity did fall within the scope of Capper-Volstead.

Right after that happened, I happened to be present at a meeting in which a speech was being made by an official of the Justice Department. I think Mr. Wagner and I were discussing earlier—I believe Mr. Wagner is familiar with this speech. It was made by an official of the FTC. Both of whom made the comment that in their opinion this activity was not protected by the Capper-Volstead Act, irrespective of what the ninth Circuit said.

I think that the type of situation I am trying to put forward to you, the thing that I believe gives us the greatest concern, is what if you had a situation like that where you had two associations that decided to form a marketing agency in common to perform some activity that was protected under the Capper-Volstead Act, but the FTC did not think that was a protected activity.

The CHAIRMAN. There is nothing in that answer limited to the FTC. Every agency that I know of makes decisions as to whether or not they are going to—and I will phrase this carefully—live by a decision of a particular circuit or appeal it. They may not think the circuit made the right decision but they may choose not to appeal it.

That does not mean they think it is right, but so long as they are in the circuit they are going to live with it. On occasion they will decide to go up to the Supreme Court on it, but the statement that you have just given me is not any different than I have found from almost any other agency in Government faced with the problem of a district court decision, or a court of appeals decision, they disagree with.

Mr. KRZYMINSKI. I do not think there is any other industry in the country that has a provision such as Capper-Volstead that the cooperatives do. I think that is what makes us unique, Senator.

The CHAIRMAN. Let's take a co-op that processes milk and butter. It is a big co-op. It says to the grocery stores: "You are going to handle our products and no others if you want to handle ours." That would be out of the jurisdiction of the FTC unless the Secretary of Agriculture says it does not fall within Capper-Volstead?

Mr. KRZYMINSKI. This is really in Mr. Wagner's area. Would you mind having Mr. Wagner answer this?

Mr. WAGNER. Well, I think I would have to say that depends on a lot of the circumstances. Ordinarily you can decide who you sell to, but that sounds like full-line forcing.

The CHAIRMAN. What I am saying is, before the FTC could do anything, the Secretary of Agriculture would have to make a decision, would he not, under this amendment that we are talking about?

Mr. WAGNER. I am not familiar enough with the language to say whether or not that would be necessary.

Mr. KRZYMINSKI. I think that is probably right under the Kasten language.

The CHAIRMAN. And you are supporting the Kasten language.

Mr. KRZYMINSKI. We are supporting the Kasten approach. We have met with your staff during, as you are probably aware, the lame duck session to see if we could come up with something that would be more acceptable to the committee, and knowing what your views were and the dissenting opinion of last year's report, we have been trying to work within that language to see if we could come up with a better remedy.

The CHAIRMAN. Let us go through the procedures once more. Whether or not it is buying a new car dealership or forcing a grocery store to handle their product, as I understand the Kasten amendment this is roughly how the procedure would work.

Let's say the FTC investigates. They want to sue the co-op. First they have to refer the jurisdictional issue to the Department of Agriculture. Then Agriculture makes a determination. That determination is subject to review in the district court. Am I OK so far on what the procedure is?

Mr. KRZYMINSKI. Yes.

The CHAIRMAN. That is reviewed by the court of appeals, assuming you want to appeal it, and by the Supreme Court, and back to Agriculture to incorporate any kind of judicial guidance. Then and only then does the Federal Trade Commission come in on the merits, as I understand the process.

Mr. KRZYMINSKI. That is correct.

The CHAIRMAN. All the while, if indeed a co-op is violating the antitrust laws, they are going to be at least exempt from any kind of enforcement during all of that period of time.

Mr. KRZYMINSKI. Well, they are not exempt from enforcement by the Justice Department.

The CHAIRMAN. I am talking about the Federal Trade Commission.

Mr. KRZYMINSKI. Yes. As far as the Federal Trade Commission is concerned, that is correct.

The CHAIRMAN. We perpetually have a debate as to whether or not antitrust jurisdiction should be centered in one department. By and large that debate does not come from either Justice or the Federal Trade Commission. They seem to get along with each other. It comes from people who either do not like the way the Department of Justice enforces it or the way the FTC enforces it and all of the opinions do not necessarily come down on the side of giving it to the Department of Justice.

There are some who would be happy to give it all to the Federal Trade Commission, but that is really the old ox case. My hunch would be the very, very largest corporations in this country involved in tremendous antitrust suits would be just as happy to shift it over to the Federal Trade Commission and have the Department of Justice out of it.

As I say, it is not a problem that has bothered the two departments. They have gotten along harmoniously for several years.

Mr. Randall, let me ask you a question. How do you think the Kasten amendment would affect the Federal Trade Commission suits against cooperatives? I am talking about the Kasten amendment as we have been discussing it.

Mr. RANDALL. I believe it would completely block the Federal Trade Commission from any further activity except on approval by the Secretary of Agriculture. There is a side effect that I think would come from that.

The Clayton Act has a provision which permits suits provided there is FTC jurisdiction over a matter by a private individual. If in fact there was a hiatus or no jurisdictional—no jurisdiction conveyed upon the Federal Trade Commission, there would then be a block of a private suit under the Clayton Act, in my opinion.

So I think it goes beyond——

The **Chairman**. I do too.

Mr. **Randall**. I think it reaches Hart-Scott-Rodino. I think it would just nullify Hart-Scott-Rodino and do the same thing for private litigation under the Clayton Act.

The **Chairman**. What is your view of the FTC in studying agricultural marketing?

Mr. **Randall**. I think it is absolutely essential that they do that because of two things. We know from the recent study by USDA and the President's—and USDA's announcement dealing with marketing orders in general that there are a number of serious problems with them, some real economic problems.

I for one am convinced that they offer artificial barriers which have inflated the price of the products, that have caused us to lose demand for those products, ultimately harming the farmer and those, combined with the power of the co-ops—both their political power because of their PAC's, as well as their power in control of those market orders—to eliminate competition from the small proprietary, in particular even some of the big ones that are beginning to get out of it.

I am shocked further by an internal document we got a couple of years ago from the Federal Cooperative Service that said it was their intent to create two cooperatives, one east of the Mississippi and one west of the Mississippi to market all of the milk in the United States. That so shocked me that when Secretary Block was nominated and just after his confirmation I went over to see him, and I asked him if he was going to pursue that policy. He said he was not.

I asked him how he was going to unlock the rudders of the bureaucrats who were down in there who had it dead set to do that, and I am not sure I got a good answer on that. To us, this would be the ruination, the end of proprietaries, small proprietary dairies in the country.

The **Chairman**. Mr. Campbell, let me ask you or the others, if you know, when is the last time the Secretary of Agriculture brought an antitrust suit? Never?

Mr. **Campbell**. To my knowledge, Mr. Chairman, the Secretary of Agriculture has never brought an antitrust suit. In the 60 years the Secretary has had his role under section 2 of Capper-Volstead, he has commenced only one investigation of price enhancement and that did not result in a suit.

The **Chairman**. I do not even recall opinions that come out of the Department of Agriculture.

Mr. **Campbell**. I do not recall any.

The **Chairman**. Mr. Krzyminski?

Mr. **Krzyminski**. I recall when Secretary Bergland testified before the National Commission for Review of Antitrust Laws and Procedures, he testified there were somewhere in the neighborhood of 9 to 11 undue price enhancement cases that had been investigated by the Department, investigated in various degrees.

But there was a recent one back in the 1970's—maybe Mr. Wagner would know more precisely when it was—involving alleged overpricing on milk. That was a very thorough investigation done by the Department. They looked into it and they concluded there was no undue price enhancement.

The CHAIRMAN. Mr. Wagner?

Mr. WAGNER. There was an extensive study by the Department of Agriculture on milk and what happened to the over-order charges and the result, of course, indicated that the cooperatives in nearly all cases either returned them to the producer or as expenses increased they used them up in handling the milk, which is what is happening at the present time.

I would like to make a quick comment as to——

The CHAIRMAN. Sure, go ahead.

Mr. WAGNER. As far as Mr. Campbell's comment on the *Virginia* case, we consider that good law. Those were brought by the Department of Justice. Under this amendment there would still be no change as far as that law or the right to bring cases.

My concern is that on market orders, which does not seem to be the thrust here, but it should be pointed out that the FTC can participate in all the public hearings the Secretary holds on market orders and could avail themselves of whatever information there is.

As far as the descending numbers or declining numbers in processors, I do not believe that is due to the cooperatives. I am sure in the area I operate that has happened, but I do not believe it is due to the cooperatives. In our own case, we are not very much involved in the packaging of milk to consumers, but I can see that coming on because, for example, we sell about half of all our milk to three big processors.

We have some independents that are thriving and some that are not. I do not think it has anything to do with these matters. I too think that if you want what you would call a moderate approach that packers and stockyard division between the FTC and the Department might have some merit.

The CHAIRMAN. Mr. Campbell, explain in some detail, if you will, how the bill our committee reported last year would have affect the FTC merger enforcement, particularly under Hart-Scott-Rodino.

Mr. CAMPBELL. Are you referring, Mr. Chairman, to the restriction on our authorization that we could not study?

The CHAIRMAN. Yes.

Mr. CAMPBELL. It prohibits us from studying any activity by those cooperatives subject to the Capper-Volstead Act, but it does not prohibit us from investigating acquisitions, even if they involve a cooperative under our Hart-Scott-Rodino authority. It does not impose any restriction or impediment on our time period under the 15 days under our cash tender offer, so we are able to accept a Hart-Scott-Rodino filing, make our decision within 15 or 30 days.

The Commission would then issue a second request for information. After receiving that 15 or 20 days later, we would be able to go into Federal court and seek an injunction against it. All of this is because we would have—the Commission would have been convinced at an early stage that the conduct we were investigating was outside Capper-Volstead.

The examples I gave before, such as an acquisition by a cooperative, by a proprietary, which was the case in Dairymen Inc, or, as we discussed here, other sorts of acquisitions involving a cooperative on one side and industry on the other, that is not even in agriculture. So the only restriction that really pinches is that we cannot study because the requirement that we not study would include those areas of conduct that are under Capper-Volstead.

I have no problem with abiding by the Capper-Volstead restriction under antitrust authority, but one of the purposes of establishing the Trade Commission in 1914—and it is embodied in section 6—was to allow the Commission to study and report to Congress and other interested bodies from time to time as to those aspects in American commerce that were causing competitive problems, and that we cannot do as to conduct, which is under the Capper-Volstead Act.

The final point on that, as I read that restriction, your question dealt with that, I do not believe we could participate in the Department of Agriculture's public hearings as to whether there had been undue price enhancement. We would be spending money. I read the restriction on our authorization and appropriation that we not spend money for any study. I think the term reads "any study".

The CHAIRMAN. Gentlemen, I have no more questions. I appreciate you accommodating my schedule by waiting. Thank you.

We will adjourn until tomorrow morning.

[Whereupon, at 1:02 p.m., the committee adjourned, to reconvene at 9:30 a.m., Thursday, March 17, 1983.]

FEDERAL TRADE COMMISSION REAUTHORIZATION

THURSDAY, MARCH 17, 1983

U.S. SENATE,
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION,
Washington, D.C.

The committee met, pursuant to notice, at 9:30 a.m., in room SR-253, Russell Senate Office Building, Hon. Bob Packwood (chairman of the committee) presiding.

OPENING STATEMENT BY THE CHAIRMAN

The CHAIRMAN. The committee will come to order, please.

I might advise the witnesses that we are in the same situation we found ourselves in yesterday, a different bill on the Senate floor, but the same situation. We may have a variety of votes this morning. I would just as soon get started with the witnesses now in the hopes that we can get through a panel before we have to break for a bit to vote and come back. We will try to finish this morning, however.

Senator Rudman wants to testify, but indicated he would be a little bit late, so I would like to go ahead with the panel we have first with Dr. Boyle, Mr. Lunch, Mr. Goldbeck and Jay Angoff.

Gentlemen, if you want to come forward, we will start.

Let us go ahead in the order in which you appear on the witness list. We will start with Dr. Boyle.

Doctor?

STATEMENTS OF DR. JOSEPH F. BOYLE, CHAIRMAN, BOARD OF TRUSTEES, AMERICAN MEDICAL ASSOCIATION; MILTON F. LUNCH, GENERAL COUNSEL, NATIONAL SOCIETY OF PROFESSIONAL ENGINEERS, ACCOMPANIED BY MARTIN MICHAELSON AND TOM LEARY; WILLIS D. GOLDBECK, PRESIDENT, WASHINGTON BUSINESS GROUP ON HEALTH; ACCOMPANIED BY WILLIAM KASCHUB, VICE PRESIDENT, HUMAN RESOURCES RELATIONS, GTE; AND JAY ANGOFF, CONGRESS WATCH

Dr. BOYLE. Mr. Chairman, I am Dr. Joseph Boyle. I am a physician in the practice of internal medicine in Los Angeles, Calif. I am chairman of the board of trustees of the American Medical Association.

We greatly appreciate this opportunity to appear before you and present our views on the issue of regulation of the profession and nonprofit associations by the Federal Trade Commission.

Mr. Chairman, our concerns can best be understood within the context of the activities of professionals and their professional associations. Public interest activities of nonprofit professional associations include establishing voluntary standards for certification of professional competence, participating in the accreditation of medical and other professional schools, working to hold down the cost of medical care and other professional services, striving to make quality care available to those who are in need, and setting standards to protect the public from deception and incompetence.

If these activities are halted, the real loser is the consumer whom such activities are intended to protect.

Currently, many beneficial activities are being abandoned by professional associations for fear of becoming involved in an expensive and time-consuming battle with the Federal Trade Commission. During the debate in the Congress, the FTC supported legislation that would place limits on its authority to regulate professions. The FTC stated that it did not want to regulate the quality or clinical side of medical practice. It did not wish to interfere with professional review of exorbitant fees or with responsible self-regulatory activities against unethical practices and unqualified members of the profession.

The FTC has expressed its intention to regulate only the business and commercial aspects of the practice of medicine. However, even with such assurances, associations must be extremely cautious in these areas because of the risk of expensive and time-consuming administrative actions. In an attempt to resolve these issues, we have engaged in discussions with the FTC Chairman. These discussions continue.

The need is clear for Congress to enact legislation to set limits on the role of the FTC concerning the professions. Actions in the last Congress indicated strong support for legislation limiting the authority of the FTC concerning the professions.

Congress should protect traditional State-regulated activities and make clear that responsible self-regulatory activities such as accreditation of educational programs, accreditation of educational and health care institutions, certification of entry-level competence of members, peer review activities to assure quality services and reasonable charges, and regulation of unethical conduct are appropriate roles for the professions.

Until Congress acts to place some limits on the FTC's authority to invalidate State laws and regulations concerning education, training and experience requirements for licensing and permissible tasks and duties of State-regulated professions, however, there is serious concern over the breadth of FTC authority.

Further, it could take many years for the courts to define, with specificity, the allowable role of professional self-regulation and, during this period, the self-regulatory activities of professional associations will be limited, or could be terminated.

We believe the Congress should limit the application of the FTC authority to the professions and their professional associations in such a way as to provide adequate safeguards that will allow continuation of the beneficial patient advocacy activities of responsible, professional self-regulation and would continue the traditional role of State regulation.

Mr. Chairman, we believe that it is time for the Congress to send a clear message to the FTC as to the scope of its authority. We urge this committee to adopt necessary amendments to the FTC Act that will clearly address the concerns we have raised today about FTC activities in regulating the professions.

In addition to this, we support other modifications to the act, such as a definition of unfair practices to require substantial consumer injury that is not outweighed by countervailing benefits. The inclusion of the prevalence requirement for rulemaking, repeal of the intervenor funding program and incorporation of State action doctrines under the FTC Act would also improve administration of the act.

Mr. Chairman, we will be pleased to respond to any questions.

[The statement follows:]

STATEMENT OF DR. JOSEPH F. BOYLE, CHAIRMAN, BOARD OF TRUSTEES, AMERICAN MEDICAL ASSOCIATION

Mr. Chairman and Members of the Committee, my name is Joseph F. Boyle, M.D., and I am a physician in the practice of internal medicine in Los Angeles, California. I am the Chairman of the Board of Trustees of the American Medical Association. We thank you for this opportunity to present the views of the Association concerning regulation of professions and non-profit professional associations by the Federal Trade Commission.

Mr. Chairman, the AMA is a physician membership association, but our goals and concerns extend beyond the profession to the betterment of public health. Our principal interest as physicians is the health and welfare of our patients. We are concerned about a broad range of health issues including promotion of healthful lifestyles, prevention of disease and injuries, improvements in the practice of medicine, publication and distribution of new medical information, accreditation of both undergraduate and graduate medical education, upholding of standards of professional conduct by members of the medical profession, the elimination of practices that are not beneficial or are potentially harmful to the public regardless of whether performed by physicians or others, as well as participation in activities to lower the increases in the cost of medical care. In our view, activities in such areas—expected by the public to be fostered by the profession—are socially desirable activities that should be encouraged in the public interest. The AMA and other medical associations have been discouraged, however, from pursuing many public interest activities because of prior actions of the FTC and concerns about potential FTC intervention which may involve undue financial risk and other burdens.

It is our intention to state briefly our concerns and, most importantly, elaborate on our goals so that any misunderstanding will be dispelled. When it comes down to the bottom line, our common goal—that is, the goal of the Congress, the FTC, and the professions—must be furtherance of the public interest. Let me assure you, Mr. Chairman, that is our objective and we know it is yours too. We are willing to work with all parties to achieve this goal.

In the last Congress we sought clarification that the Congress had not granted jurisdiction to FTC over the professions and their membership organizations. Litigation involving this issue had reached the Supreme Court, which in a 4-4 decision (without written opinion) let stand a lower court decision upholding, but modifying, an FTC order against the AMA.

Only a few months ago the House of Representatives acted on this issue and in a decisive vote (245-155) voted a moratorium on FTC jurisdiction over the professions. In the Senate, the Commerce Committee denied FTC jurisdiction, but under the time pressures of a lame duck session the Senate did not vote on the matter directly.

Mr. Chairman, FTC regulation of the professions and the general application of antitrust laws to the professions are relatively recent developments. These areas were opened in 1975, not by Congress, but by the Supreme Court in the *Goldfarb* case. The ruling in *Goldfarb* initiated rapidly evolving interpretations of how the antitrust laws are to apply to the voluntary self-regulatory activities of professional associations. The courts, the Justice Department and the FTC all assumed active roles in carving out new areas for antitrust enforcement. Little attention was paid to the special form of regulation imposed upon the professions by the states and the incompatibility of unrestricted competitive practices with such professional regulation. We are, therefore, in a relatively new and dynamic area of the law. The boundaries and principles of this law are being set by the courts since Congress has not acted to modify the FTC Act to reflect the uniqueness of the professions and their self-regulatory activities.

FTC regulation of the professions has been the subject of extensive Congressional debate during the last several years. The appropriate role of the FTC has been discussed in light of the traditional state function of regulating the professions under our system of federalism and the authority of the Department of Justice, the states and individuals to enforce the antitrust laws. The action of the House of Representatives and Senate Commerce Committee would have allowed the states to continue to regulate the professions, and the federal antitrust laws could have been enforced by the Department of Justice, state attorneys general and private citizens.

Mr. Chairman, our concerns can best be understood within the context of the activities of professionals and their professional associations. Public interest activities of non-profit professional associations include establishing voluntary standards for certification of professional competence, participating in the accreditation of medical and other professional schools, working to hold down the cost of medical care and other professional services, striving to make quality care available to those who are in need, and setting standards to protect the public from deception and incompetence. If these activities are halted, the real loser is the consumer whom such activities are intended to protect. Currently many beneficial activities are being abandoned by professional associations for fear of becoming involved in an expensive and time consuming battle with the FTC.

During the debate in Congress the FTC supported legislation that would place limits on its authority to regulate the professions. The FTC stated that it did not want to regulate the quality or clinical side of medical practice. It did not wish to interfere with professional review of exorbitant fees or with responsible self-regulatory activities against unethical practices and unqualified members of the profession. The FTC has expressed its intention to regulate only the business and commercial aspects of the practice of medicine. Even with such assurance, however, associations must be extremely cautious in these areas because of the risk of expensive and time-consuming administrative action. In an attempt to resolve these issues, we have engaged in discussions with the FTC Chairman and these are continuing.

The need is clear for Congress to enact legislation to set limits on the role of the FTC concerning the professions. Actions in the last Congress indicated strong support for legislation limiting the authority of the FTC concerning the professions. Congress should protect traditional state regulatory activities and make clear that responsible self-regulatory activities, such as accreditation of educational programs, accreditation of educational and health care institutions, certification of entry-level competence of members, peer review activities to assure quality services and reasonable charges, and regulation of unethical conduct are appropriate roles for the professions.

Until Congress acts to place some limits on the FTC's authority to invalidate state laws and regulations concerning education, training and experience requirements for licensing and permissible tasks and duties of state regulated professionals, however, there is serious concern over the breadth of FTC authority. Further, it could take many years for the courts to define with specificity the allowable role of professional self-regulation, and during this period the self-regulatory activities of professional associations will be limited or could be terminated. We believe Congress should limit the application of the FTC Act to the professions and their professional associations in such a way as to provide adequate safeguards that will allow continuation of the beneficial patient advocacy activities of responsible professional self-regulation and that would continue the traditional role of state regulation.

In calling for a limitation on FTC authority it must be stated again that the AMA does not condone violations of the antitrust laws, such as unlawful boycotts or price-fixing. FTC antitrust authority in commercial areas of professional activities has been upheld by a divided U.S. Supreme Court. In our view, when professional regulatory activities involving public benefit and patient advocacy are before the courts, a rule of reason analysis should be applied.

In addition to the foregoing changes, we support other modifications to the Act such as a definition of unfair acts or practices to require substantial consumer injury that is not outweighed by countervailing benefits, the inclusion of the prevalence requirement for rulemaking, repeal of the intervenor funding program and incorporation of the state action doctrine into the FTC Act.

It is time, Mr. Chairman, to send a clear message to the FTC as to the scope of its authority. We urge this Committee to adopt necessary amendments to the FTC Act that will clearly address the concerns we have raised today about FTC activity in regulating the professions.

At this time we will be pleased to respond to any questions the Committee may have.

The CHAIRMAN. Thank you, Doctor. Our normal practice is to take the entire panel, and then I think we will have questions for all of you.

Mr. Lunch, you are next.

Mr. LUNCH. Thank you, Mr. Chairman.

I am Milton F. Lunch, general counsel of the National Society of Professional Engineers, and I have with me Martin Michaelson and Tom Leary of the law firm of Hogan and Hartson who have been working with us on this matter for several years.

Mr. Chairman, we said last year in the discussions and say again this year that we do not seek exemption of the professions from the Federal Trade Commission authority. I think it is fairly clear that the debates in the House and the Senate last year have indicated that Congress is not disposed toward total exemptions of professions and we do not urge that position here.

We do make basically three points, however, which we believe Congress should consider. First, it is our position that the professional standards which are guided by somewhat at least of a fiduciary relationship, a relationship of trust between the professional and the patient or the client, as the case may be, should not be looked upon in the same light as the evaluation of commercial practices in the business world.

There are differences, and we note in our statement a quotation from the Supreme Court decision, "It would be unrealistic to view the practice of professions as interchangeable with other business activities."

So on that basis, Mr. Chairman, we believe that primary emphasis and the resolution of the legislative question with regard to professional standards should be placed upon a balancing test, if you will, a concept which says that the Commission will look upon a question of professional standards in light of its social utility and value and not merely look solely at the question of whether it is procompetitive or anticompetitive.

Put another way, we suggest that, with regard to professional standards, there ought to be an opportunity for the particular profession involved in the particular case, under the facts of that case, to consider the value of the particular rule or standard in question, to allow the profession in question to have, if you will, a day in court to give the background and the justification. The justification may or may not be acceptable to the Commission or some other regulatory authority, but at least that opportunity should be given, in our opinion, to evaluate the merit of a professional standard versus its alleged anticompetitive effect, only.

Our final major point—and we have spelled out a draft legislation which is attached to our full statement, Mr. Chairman, to carry out these points, the language obviously being subject to consideration and discussion and revision.

Our final major point is that the law should specifically recognize that the FTC should not have authority to override State laws regulating the profession. This is, historically, a traditional function of the States to regulate the professions under the police power of the States, and we suggest that the legislation as it may finally emerge, recognize the so-called State action doctrine, or the Parker doctrine, which leaves to the courts the evaluation of whether a particular State law, or State regulation authorized by State law, is within or not within the State action doctrine.

But we would suggest and urge that the committee recognize that the basic regulation of the professions should be left in the hands of the States.

Now, there are those whom, we understand, fear that the State boards that regulate the professions may go too far and may attempt to provide procedures which are more of a business or commercial nature than of a professional nature. We suggest that there is a very effective answer to that concern, and it has been exercised in many, many instances, and that is the overriding authority of the State legislature to restrict, or restrain, the board in the State law setting up the professional boards.

We can provide examples where this has been done, where a State legislature feels that a particular professional licensing board, in its rules and regulations has perhaps gone too far on a particular point.

Thank you very much, Mr. Chairman.

[The statement follows:]

Statement of Milton F. Lunch, National Society of Professional Engineers

Mr. Chairman, we appreciate this opportunity to appear before the Committee to present our views and suggestions regarding the authority of the Federal Trade Commission over the professions.

We offer two basic points essential to our position:

1. There are vital differences between practicing a learned profession and operating a commercial business; but that does not mean the professions should be above the law.
2. When the law fails to recognize the differences between the client-professional relationship and the commercial buyer-seller relationship, the victims will be, first, the clients and the public, and secondly, the professions.

We believe that analysis of professional conduct under the Federal antitrust laws should recognize the public service requirements of the learned professions, considering the effects of professional conduct on the public health, safety, and welfare. We also believe that the determination of what kind and scope of regulation is appropriate to assure the quality and availability of professional services is properly the province of the states, which exercise the traditional authority to regulate the professions under their police powers.

We use the term "professions" in the old-fashioned sense of a learned vocation—a vocation for the provision of many of society's most essential services, including public health, the legal system, applied technology and science. Society has an enormous stake in the effective performance of these services, which, because they are highly specialized and require advanced training, cannot be evaluated by most clients.

Although few of us are old enough to remember it, there was a time in this country, within the past century, when professional practice operated under the rule of the commercial marketplace—without ethics, without professional societies and without peer review. To reverse the many adverse effects on social welfare which resulted from the practices of that era, the states and the professions themselves established codes of conduct, educational requirements, and various other measures to ensure delivery of high quality, ethical professional services. These measures were necessary because professional services by their nature include public service objectives other than marketing a product at the lowest possible price. This system of professional regulation, although not perfect, has worked very well for many years. Today our nation can rightly boast that its professional services—certainly including engineering—are second to none in the world.

The members of this Committee are well aware that application of the Federal antitrust laws to the various professions, both by the FTC and the Department of Justice, has greatly increased in recent years. Most frequently, this has taken the form of challenges to professional standards promulgated by professional societies, on the grounds that these standards, which were intended to protect the public from overreaching and abuse, restrain competition and raise prices to the consumer. A review of antitrust cases for the years 1972-1982 discloses nearly 100 instances in which the FTC or the Antitrust Division either filed suit or commenced investigations involving a wide variety of professional ethical standards. These cases and investigations have dealt with such issues as whether there should be standards for entering into a profession; whether there should be standards for education of professionals; whether there should be any limitations on solicitation of clients; whether the development of technical standards within a profession should be prohibited; and whether professional ethics should be abolished.

The number and scope of these lawsuits and investigations have imposed a major burden upon the professions, not only because of the time and effort necessary to defend against these claims, but also because of the enormous litigation expense involved.

The courts have not deterred these government enforcement agencies in their attempts to regulate the professions. In one sense, that is not surprising, since existing antitrust laws, which date from the late 19th and early 20th centuries, were never intended to apply to the professions. The lines of analysis which have been developed under these laws therefore were not designed to accommodate the factors which must of necessity be taken into account in considering the reasonableness of professional conduct.

When the Sherman Antitrust Act was passed in 1890, nothing in its legislative history even remotely suggested that it was intended to apply to the learned professions, professional practices or professional ethics. Similarly, the legislative history of the Federal Trade Commission Act, passed in 1914, contains no reference to regulation of the professions. To the contrary, these laws, and the judicial decisions which have been handed down since their passage, focus exclusively on the promotion of competition and the regulation of commercial business. Thus, in determining the reasonableness of a particular commercial practice, traditional antitrust analysis considers only the effects of that practice on price and competition.

The Supreme Court has directly suggested that this mode of analysis may be inappropriate in the context of professional practices:

"The fact that a restraint operates upon a profession as distinguished from a business is, of course, relevant in determining whether that particular restraint violates the Sherman Act. It would be unrealistic to view the practice of professions as interchangeable with other business activities, and automatically to apply to the professions antitrust concepts which originated in other areas. The public service aspect, and other features of the professions, may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently."[1]

Nevertheless, the *National Society of Professional Engineers* case, the Supreme Court specifically held that the Sherman Act in its present form, precludes courts from taking into consideration such factors as benefits to public safety, health, and welfare when considering the reasonableness of professional standards which otherwise restrain competition. The Supreme Court states that "[t]hat kind of argument is properly addressed to Congress . . ."[2]

And so, Mr. Chairman, we are here today. Congress is our ultimate forum. We respectfully submit to the Congress that regulation of the learned professions should not be—indeed, cannot be—undertaken on the same basis as the general regulation of commercial businesses. The historic standards of professional practice must not be reduced to the marketplace standards of buyer and seller. Professional ethics must not be replaced with the commercial rule of "let the buyer beware."

In the professional context, shaving the quality of the service merely to make it available at the lowest possible price not only is a questionable approach—it can lead to disastrous results. In the design professions, the effects on public safety of an erosion in the quality of professional services should be obvious. To permit our professional standards, which are designed to ensure quality service, to be judged on the basis of their alleged effects on competition, without permitting any consideration whatsoever of the countervailing social benefits, is not merely shortsighted, it is just plain stupid.

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[1] *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 788 n. 17 (1975).

[2] 435 U.S. at 689.

Moreover, many professional standards and practices which are undertaken out of a legitimate concern for quality may appear to have adverse effects on competition, but may in fact be the most efficient way to accomplish one of the ultimate goals of business regulation: the delivery of high quality goods and services at a reasonable cost. Indeed, many standards of professional practice, including the very standard struck down by the Supreme Court in the *National Society of Professional Engineers* case, directly reflect and parallel the requirements of long-standing Federal law, policy, or practice.[3]

When the Supreme Court, in applying the Federal antitrust laws, strikes down professional standards which specifically reflect other Federal statutes, regulations and practices, is it not high time for a more rational and coherent government policy with regard to the professions?

We strongly recommend that this Committee consider amendments to the Federal Trade Commission Act which would appropriately define that agency's authority with respect to the professions. We do not seek exemption for the professions from the antitrust laws. Rather, we believe that those laws should be amended to require consideration of the social value of a professional practice in relation to any commercial restraint which may result from it.

Specifically, we suggest, first, that the Federal Trade Commission Act be amended to require that in interpreting a professional standard or practice under the Act, the FTC must weigh, on the record, the overall social utility and value of the standard or practice in question against any alleged anticompetitive effects, and that such standard or practice may not be struck down without clear evidence that it is unjustified. We emphasize that we are not asking that the professions be shielded from liability for anticompetitive practices for which there are not countervailing social benefits. We merely ask that before imposing such liability, the FTC be required to consider the public interest involved—which in reality is no more than it should be doing before exercising any form of regulatory authority.

Second, we recommend that the Federal Trade Commission Act be amended to make clear that the Act is not intended to give the FTC authority to preempt state legislative or administrative standards regulating the professions. We believe this is in fact the intent of the current law, and note that this interpretation is consistent with Supreme Court antitrust decisions dating back to 1943.[4] The FTC, however, apparently thinks it should regulate the states. In a recent rulemaking proceeding, the FTC attempted to impose a preemption of numerous state laws.[5] And in its so-called "occupational deregulation inquiries", the FTC signaled its willingness to usurp the states' traditional role in regulating professional practices, and indicated that it believes state "deregulation" to be the proper approach to professional services.

The United States Supreme Court has consistently recognized the authority of the states to regulate the professions:

"We recognize that the states have a compelling interest in the practice of professions within their boundaries, and that as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions." [6] We believe that the FTC has neither the authority nor the expertise to decide what regulations are appropriate to assure quality of services in the professions. We therefore believe it appropriate to amend the Act specifically to so provide.

The Senate and House debates on this issue in 1982 provided valuable insight into the philosophies and proposals we have discussed here. Based on that experience we believe that the time is now ripe for all concerned to recognize the political reality that the FTC will retain general jurisdiction over the professions. At the same time, we think that the 1982 experience leads to a recognition that this function should be tempered with a recognition of the two principles we have advanced—that a balancing test should be required for the evaluation of professional standards, and, secondly, that the legislation should specifically recognize the overriding right of the states to regulate the professions without federal interference.

Looking back a few months to the 1982 experience on this issue, we suggest that the amendment adopted by the Senate did not go far enough to deal with the real problems involved in this matter. The issues which arise go beyond training, education or experience requirements for licensure. Of equal, or more, pragmatic importance are those questions of proper restrictions on methods of practice which may, or may not, adversely impact the public health and safety. This is not the time or place to attempt to list or pinpoint the great variety of such questions which arise in real world situations. Each issue of that type needs to be addressed on its merits under the specific facts, circumstances and background. All that is needed now is a clear statement of a requirement for a balancing test to be followed by the Commission. Nor did the Senate amendment address the critical issue of the Commission's authority to preempt state law governing the professions.

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[3] *See, e.g.*, 40 U.S.C. Sec. 541-44.

[4] *Parker* v. *Brown*, 317 U.S. 341 (1943).

[5] *American Optometric Association* v. FTC, 626 F. 2d 896, 910 (D.C. Cir. 1980).

[6] *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 792 (1975).

The so-called Broyhill amendment, recommended by the House Committee, but rejected on the House floor in favor of a total exemption of the professions (a position we did not support and which has now been apparently abandoned by its proponents), partially recognized the role of the states in regulating the professions by incorporating a provision that the Commission shall not have authority to find a method of competition unlawful if such method of competition would be held to constitute state action under the Sherman Act. We recommend that the Senate adopt a similar concept, and have suggested language to that effect in our attached draft legislative language.

We dispute the contention that the FTC should have jurisdiction over state laws and regulations under those laws governing the professions if the Commission should determine that they involve business or commercial practices. We submit that such a distinction between professional functions and business or commercial practices is unrealistic and virtually impossible of implementation.

The effective answer to state laws or regulations which are deemed to be clearly offensive, such as price fixing or boycotts, can be dealt with by exercise of the overriding authority of the state legislatures. There are a number of examples in which the state legislatures have limited the authority of state licensing agencies to prevent improper rules or regulations.

Mr. Chairman, we believe, and we hope, that the Members of this Committee and the Commission would agree, that the approach we have suggested is a proper and necesary accommodation of the public's interests in competition and in obtaining quality profesional services. We are available to work with the Committee and its staff in any way which you would consider helpful.

This concludes our statement. My colleagues and I will be glad to reponse to any questions you may have.

Attachment.

AMENDMENTS RESPECTING PROFESSIONAL ETHICAL STANDARDS

SECTION 1. Section 4 of the Federal Trade Commission Act is amended by adding at the end thereof the following new paragraphs:

" 'Learned profession' means an occupation which is predominantly composed of persons engaged in work (i) intellectual and varied in character (as distinguished from routine mental, manual, mechanical, or physical work), (ii) involving the consistent exercise of discretion and judgment in its performance, (iii) of such a charecter that the output produced or the result accomplished cannot be standardized in relation to a given period of time, (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of study in an institution of higher learning or a hospital, as distinguished from training in the performance of routine mental, manual, mechanical, or physical processes; and the practice of which occupation is subject to issuance of a license or certificate by an agency, board, or other entity acting pursuant to authority conferred by State law.

" 'Professional standard' means an ethical, instructional, educational, vocational, or other rule, practice, procedure, or guideline promulgated by or for the guidance of practitioners of a learned profession which relates to (i) the qualifications, education, or training of practitioners of a learned profession, (ii) the practitioner's relations with his clients, other practitioners, government, or others, or (iii) the maintenance or operation of associations or societies of practitioners."

SEC. 2. Section 5(a) of the Federal Trade Commission Act is amended by adding at the end thereof the following new paragraphs:

"(3) In determining whether an act or practice in connection with the promulgation, enforcement, maintenance, or operation of a professional standard constitutes an unfair method of competition or an unfair or deceptive act or practice within the meaning of this Act, the Commission shall give due weight to the benefits of such standard to the public health, safety, and welfare.

"(4) Nothing contained in this Act shall render unlawful any method of competition or act or practice in connection with the promulgation, enforcement, maintenance, or operation of a professional standard, if such method of competition or act or practice is in compliance with an applicable statute enacted by a State legislature relating to a professional standard or is in compliance with a rule or regulation promulgated by an agency, board, or other entity acting pursuant to authority conferred by State law to regulate professional standards.

"(5) The Commission's authority to promulgate rules regarding, and to bring civil actions involving, professional standards shall be co-extensive with its authority to hold such standards unlawful."

The **CHAIRMAN**. Thank you very much, Mr. Lunch.

Mr. Goldbeck?

Mr. **GOLDBECK**. Mr. Chairman, I am Willis Goldbeck, the president of the Washington Business Group on Health, and with me today is William Kaschub, from General Telephone and Electronics, who will make his own statement.

As you know, we are an organization of large purchasers around the United States, a group that is not necessarily prone to coming Congress in a proregulatory stance but, in this case, comes before you uniformly against any exemptions for the professions. It is the opinion of these employers who purchase health care to the tune of billions of dollars throughout the United States that medicine is indeed a business, one of the largest and most successful in the United States. Its period of greatest growth, both in economic terms and in terms of quality of care, came during the very period when the FTC was supposedly such a terrible barrier.

If medicine is so unique, I can assure you I can bring before you any business in the United States to claim that it is also unique, if that was a method for gaining exemption for regulatory agencies.

Specifically, our organization, our members, support the activities that the FTC has undertaken in terms of advertising, the eyeglass rule, the Indiana Dental and Texas Dental Association rules, the Michigan Medical Rule, and so forth. The acts of the FTC in these areas have been to the advantage of and receive the approval of our membership. The FTC is deemed to be preferable to the Justice Department not only because the Justice Department lacks authority over some of the areas that the FTC now has but, perhaps more importantly, because we would favor these cases being resolved within a civil setting rather than a criminal one, if at all possible. Third, because the FTC has the capability of dealing in a prospective nature. And fourth, because the FTC has the capacity to deal with trends and patterns rather than on a case-specific basis.

The FTC is deemed to be preferable, in many instances, to the States. The States attorneys general have acknowledged that they do not have either the desire or the capacity to take on more regulatory functions in this arena. The record of the States is a rather dismal one in this area and we believe strongly, particularly because we are multi-State employers, that this is an area which warrants national policy.

We find no evidence that the FTC's actions, as opposed, perhaps, to fear of action, have stopped any good deeds on behalf of any professional organizations.

Peer review can certainly continue. Professions are, in no way, deterred from stopping deceptive practices, or stopping incompetent members of their professions from reaching pinnacles of achievement.

We believe strongly that you should be very cautious and not accept the idea that quality or cost containment become factors for consideration in the adjudication of antitrust cases. There are, in fact, no manuals of standards to which you, the FTC or a law judge could turn for a definitive declaration of what such standards are.

Any industry can make the same claim, should you open that gate, and every one of our member companies could claim that those things for which it was being charged had been done for the good of someone or because of an interest in quality.

That is not a valid argument when the issue and purpose of antitrust is to deal with competition. In fact, the FTC is perfectly capable of and allowed to consider quality and cost containment issues, other social or societal factors, prior to determining that a case should be brought.

Once the determination is made, it is only then that the restrictions of antitrust laws go into place.

We also are very aware that the physicians, quite appropriately, frequently refer to the value of leaving quality consideration to the profession. Therefore, we do not believe that they should then turn around and request making quality a determining factor for FTC, its staff and law judges to weigh.

The FTC needs to protect against anticompetitive activities and to stimulate the availability of price, service and utilization comparative information available for all consumers, individual and collective. We do not accept the contention that we should leave the professions alone and that they will cure themselves.

There is nothing stopping any of the professions now from doing right and doing just. If the FTC is to be silenced, let the FTC be silenced by the absence of anticompetitive behavior to correct rather than by the revocation of its rightful authority to protect the consumer.

Thank you very much.

[The statements follow:]

STATEMENT OF WILLIS B. GOLDBECK, PRESIDENT, WASHINGTON BUSINESS GROUP ON HEALTH

My name is Willis B. Goldbeck, President of the Washington Business Group on Health. Accompanying me today are John Bauer, Supervisor of Health Care Costs for Armco Inc. and William Kaschub, Esq., Vice President-Human Resources Relation, GTE. Mr. Bauer and Mr. Kaschub will make their own statements.

INTRODUCTION

The WBGH is a national organization, the members of which are very large employers. As such, when the exemption issue arose last year, many in the professions and the Congress expected that we would be delighted to join the attack on the FTC. In fact, just the opposite occurred. The members voted overwhelmingly to oppose the exemption. That was our position last year. Today, I want to assure the Congress that our position is and will remain unchanged.

We neither arrived at nor take this stance lightly. Nor, as some on the other side have suggested, was our position reached without the full participation of our members. The original statement of opposition was approved by the Policy Committee and Board of Directors. A vote of the membership confirmed that position. Our Board was then visited by the AMA which felt their position had not been adequately explained. After the meeting, our board once again confirmed our opposition to the exemption. As the legislation moved through Congress last year, we supported the proposals of Congressman Broyhill and Senator Rudman as the most practical approaches available at that time.

This year, we begin from the position that there should be no exemption. Proposals to compromise will be considered in the future only if they are essential to preserving the basic authority of the FTC over the professions.

A final word about the strength and sincerity of opposition by our members: the vote to oppose was the most one-sided vote in our history.

COALITION OPPOSITION

So that you will understand that the opposition is not limited to national organizations, during the past three days we have asked several of the local coalitions to express their view. Most of these groups do not become regularly involved with Federal legislation. In addition, because they are at the local level and work regularly with physician groups (either as members of their coalition or through liaison committees), the decision to publicly express opposition was not reached casually. The following groups join with the Washington Business Group on Health in opposing the exemption.

1. Utah Health Cost Management Foundation;
2. San Diego Employers Health Cost Coalition;
3. Midwest Business Group on Health;
4. Cleveland Coalition on Health Care Cost Effectiveness;
5. Los Angeles Employers' Health Care Coalition;
6. Binghamton (NY) Two Rivers Health Management Association;
7. Birmingham Health Care Cost Containment Committee;
8. Iowa Health Policy Corporation;
9. Seattle: Health Care Purchasers of Pudget Sound;
10. Pittsburgh Business Group on Health;
11. Lake County (Ill) Employers Health Care Group;
12. Mid-America (Kansas City) Committee on Health Care Costs;
13. South Florida Health Action Coalition;
14. Houston Area Health Care Coalition;
15. Phenix Association of Industries Health Care Committee;
16. Oklahoma Chamber of Commerce Health Action Committee;
17. Omaha Cost Containment Coalition;
18. Santa Clara County (California) Manufacturing Group Health Care Cost Containment Committee.

During the weeks ahead, we will notify the Committee of additions to this list.

REASONS TO OPPOSE THE EXEMPTION

1. Employers oppose the exemption because medicine is a business and as such should not be granted any special status.
2. Employers oppose the exemption because we believe it is contrary to the growth of a competitive medical marketplace.
3. Real competition requires easy access to price and quality comparative information which would be less available without the FTC.
4. Real competition requires the availability of alternative delivery systems, such as HMOs, free from fear of physician boycotts.
5. Cost management, an objective that our members share with Congress and the Administration, will be hurt by any exemption that weakens the FTC's authority.
6. We agree with the position of the Association of State Attorneys General that the states do not have either the capacity or desire to replace the functions of the FTC.

SUPPORT FOR FTC ACTIONS

Employers do not want an exemption for precisely the opposite reason that the physicians are seeking the exemption:

We support the advertising rule (to remove ethical restraints against physician advertising).

We support the eyeglass rule (to remove restrictions that kept patients from being given their prescriptions).

We support the Indiana Dental Federation rule (to provide x-rays to third party carriers).

We support the recent Michigan Medical Society rule. (see below)

The latter is especially illustrative of the value of the FTC. The case arose from the action of the medical society to boycott reimbursement and cost containment policies of Blue Cross-Blue Shield and Michigan Medicaid. The case resulted from the cost containment benefit plan design changes in the UAW plan with our member auto companies. The FTC's complaint was upheld by the administrative law judge. Interestingly, the judge's order was so strong that the FTC in its final ruling issued a modification. The March 4 issue of the American Medical News quoted the Michigan Medical Society as saying "the Commission's order is much more reasonable than the administrative law judge's order". Apparently, not all physicians feel the FTC is wrong, at least not all of the time.

The following letters from WBGH members to members of Congress last Fall exemplify the concerns of many employers across the nation.

Burlington Industries.—"Doctors, lawyers, dentists and other professionals are not above Federal Trade laws, but they will be if the Luken-Lee Amendment to the FTC Authorization Bill H.R. 6995 is adopted. Luken-Lee would totally exempt professionals engaged in unfair, deceptive or non-competitive activities from FTC jurisdiction. If this controversial provision is adopted, there is a good chance the entire FTC bill and the important improvements it makes will be pulled from the floor. Burlington supports the provisions of H.R. 6995 as reported from Committee. But if Luken-Lee is offered, we ask that you oppose it and support instead the bi-partisan Broyhill/Dingell/Florio Amendment. This well-constructed amendment restricts unwarranted FTC intrusion into the professions, but preserves narrow but essential jurisdiction over unfair and anti-competitive acts. As a major consumer of medical care, Burlington sees the urgent need for increased competition to hold down rising health costs. If the FTC is stripped of its authority to stop anti-competitive practices that exist in the medical field, no other government body, state or federal, can fill the void."

Bethlehem Steel.—"In 1981, Bethlehem paid almost $190 million for health related benefits, 51 percent more than we spent in 1978. With expenditures like these, we cannot escape the fact that the practice of medicine in our society is a business which affects all of us as consumers in what should be a competitive marketplace. However, free market forces do not affect the health care sector due to the preponderance of third party payment systems, which remove consumer involvement from the process. Since employers bear ultimate private sector responsibility for these payments, we believe our opinions in matters such as this bear repeating.

"Bethlehem has specifically benefited from the FTC's involvement in the health care arena in Indiana, where dentists had organized an effort to refuse to provide insurance carriers X-rays as evidence, for payment purposes of necessity and/or completion of treatment. As a direct result of FTC intervention, the Indiana Dental Association was prohibited from withholding such material. We are certain that similar situations exist now and that absent investigative authority will, in fact, proliferate.

"Therefore, after thoroughly reviewing material with respect to this issue, including that prepared by the American Medical Association, we concur with evaluations of the House Republican Research Committee and the Association of State Attorneys General, that exemption must continue to opposed and that the activities of the FTC in preventing conspiracies, anti-competitive practices and consumer fraud with respect to the "learned professions" must be continued. Without the existence of such oversight, the public will be unprotected in a vitally important and extremely costly marketplace."

EDITORIAL OPINION

Rarely has an issue received such an outpouring of editorial opinions which came to the same conlusion: the exemption and especially the concept of relying upon state controls, is totally without merit.

Certainly, the Wall Street Journal has an editorial policy which is appropriately identified with support for deregulation. However, on the issue of the exemption, WSJ did not hesitate in stating its opposition:

"The history of state control over the professions has been largely a story of protectionism. Time and again professionals have been able to use the cloak of state authority, with its licensing requirements and codes of behavior, to restrict competition and keep others out of their lucrative trades.

"The FTC has been moving against this kind of restrictivenes, and has acted to open up the legal, dental, and medical fields to advertising by practitioners. Returning jurisdiction to the states would kill the movement.

"This time the Commission is on the side of the markets. And it bears repeating that the purpose of deregulation is to let the market in, not simply to switch regulatory functions from one jurisdictional box to another."

A cross-section of other editorials clearly demonstrates that the opposition knows neither demographic, geographical, or political boundaries:

Fort Worth Texas Star Telegram.—"State regulating agencies in which the professions exercise strong influence if not control have a tendency to stifle competition rather than foster it. It is well that the FTC keeps a hand in the regulation of the professions—for the good of the consumer."

Newark Star Ledger.—"The agency has acted to open up the legal, medical, and dental professions to the competition of a free marketplace. If this authority were given exclusively to state agencies, the competive element would be aborted, killed off."

Hartford Courant.—"States may very well be the proper authorities for determining professional qualifications. State regulators assess competence and educational standards, and they license professionals. But the economic activity of professionals is commerce in the true sense of the word. Price-fixing, deceptive advertising and anti-competitive agreements hurt consumers whether practiced by automobile manufacturers or the local medical establishment."

New York Times.—"even conservatives at the White House or the Commission understand the difference between deciding whether a dentist knows how to fix teeth and whether he or she should be permitted to do so in a department store. They also understand that state legislators are notorious patsies for professional lobbies. As a practical matter, only the F.T.C. has the independece and expertise to police the economic conduct of professionals."

Cincinnati Post, Memphis Press Scimitar, & Birmingham Post-Herald.—"Do we want a privileged class of professionals in this country that could engage in price-fixing and other anti-competitive acts and be immune from secrutiny by the Federal Trade Commission.

Chicago Tribune.—". . . fraudulent advertising and price-fixing are problems that are national in scope. That is why the federal fair trade practice and ant-trust statutes were passed in the first place.

"If cash or misguidance prove sufficient to get this nasty little measure all the way through Congress, Mr. Reagan will have good reason to use his veto. His policy on this issue is right, and the FTC deserves his support."

Lexington (Kentucky) Herald.—The FTC has stepped over the line in the past. Indeed, the entire consumerism movement has been frequently guilty of overzealous behavior. But we do not think a proper reaction to these excesses is to throw off all controls and return to the days when monopolies and sharpies were free to take advantage of consumers in anyway they wished."

WBGH RESPONSE TO THE PROFESSIONS

During the debate, those who favor the exemption have raised several issues which warrant a reply.

1. We oppose making "quality-of-care" or other undefined social factors an element in the decision process the FTC must follow when issuing a complaint. There are no publicly available standards of quality to which the FTC could turn to make a decision. Thus the physicians would be free to set their own definitions and could use these open doors to exclude certain categories of provides (such as nurse midwives) or certain care settings, (such as free-standing ambulatory surgery).

The FTC can now consider quality or any other social factor when deciding if a complaint should be made. However, these factors should not become part of the criteria for passing judgement as to whether or not an antitrust violation has been committed.

2. We reject the contention that the FTC has forced medical societies to end useful peer review programs. In fact, the FTC has acted upon the use of peer review only when it involved setting prices. There are no FTC cases pending on peer review.

3. The AMA has stated that the FTC should be prohibited from entering any case in a state in which the profession is regulated by the state. We oppose this on the grounds that it would amount to a nearly total exemption. Further, state regulation often serves only to increase costs while restricting the information that either individual or aggreagate consumers need to make meaningful choices based on price utilization, and quality.

4. No exemption should be granted which includes phrases such as "manner of practice". An open-ended, undefined term like this is advocated as a compromise when in fact its vagueness would result in far too great a reduction in FTC authority and endless litigation.

CONCLUSION

The business of medicine is one of, if not the most, successful in the United States. Its growth has come while under the FTC's jurisdiction and has been greatest during the post-1975 era in which all the FTC actions about which the AMA is complaining took place. It would indeed be hard to support the contention that the FTC has posed a serious barrier to growth, in economic terms, or quality of care (which has never been better than it is today) or to access (which is also at its peak).

It is our firm belief that, even if every complaint the professions have made against the FTC were valid, no exemption is warranted. The answer is to reform the way the FTC works, which is just what President Reagan and Chairman Miller are trying to do.

Further, we do not accept the vaildity of the medical profession's complaints. From our perspective, the FTC's actions in the health field have been justified and have been of assistance to those who are sincerely trying to to modify the rate of cost escalation while simultaneously improving the appropriateness of needed care.

STATEMENT OF WILLIAM KASCHUB, VICE PRESIDENT, HUMAN RESOURCES RELATIONS, GTE CORP.

My Name is William J. Kaschub. I am employed by GTE Corporation as its Vice President-Human Resources Relations. I have responsibility at the corporate level for Labor Relations, Employee Relations, Safety, Medical and Security. I have coordinated GTE's response to rising medical costs.

GTE has operations in 39 states and has approximately 150,000 domestic employees. Comprehensive medical plans are available to employees and dependents and, as a result, cover 350,000 persons. GTE has over 50,000 hopsital admissions annually that result in payment for 275,000 hospital days. There are 25,000 surgical procedures performed each year on our insured population in operating rooms, and obviously, there are many more instances in which GTE pays physicians' fees for treatment not involving hospitalization. The cost for all this in 1982 was $218 million. In 1983, this amount will increase by $42 million to $260 million. Our Insurance Department projects that by 1990, the GTE medical insurance tab will rise to a staggering $1 billion. These increases assume the same number of insureds and are not attributable to improved benefit coverages.

About a year-and-a-half ago, we recognized the need to radically change the way we manage the delivery of health care under our plans. It took about six months to design a system that addressed the whole problem and then we began redesigning benefit plans to encourage consumer choice, changing data systems to analyze claims, and training and developing in-house capability to assist our employees and their dependents in selecting cost-effective delivery settings and to monitor hospital and physician practice patterns. It takes time to make the new system fully operational because many of the important changes have to be negotiated with unions representing our employees. I would say we are about one year into a four-year implementation cycle.

While there are some corporations that are ahead of GTE, I can safely say that most are probably similarly situated and are now working their way through stragtegies.

Physicians are obviously key in all health care delivery cycles. As we implement our new approaches, it is important to us that they operate under the same rules applicable to all industry. I believe an exemption from FTC jurisdiction could seriously hamper our efforts to control medical costs. If the exemption has the effect of placing the regulation of anti-competitive practices back at the state level, GTE then has to tailor its responses in the 39 states it does business to each state's administrative rules, regulations, and practices. No purchaser of health care should have to worry about the possibility of anti-competitive combinations or methods being behind expensive medical care delivery mechanisms. Purchasers must have some overall, uniform administrative process to invoke, if unlawfull practices need to be remedied.

GET has employees and dependents in U.S. cities and towns of all sizes. Our insureds are more vulnerable to anti-competitive practices in some areas than in others. As we move to monitor these costs, we should be able to assume that physicians, dentists, and other professionals receiving payments from our plans are operating under the same business and marketplace rules as we are operating under.

If professionals do engage in anti-competitive practices and unlawful restraints of trade, GTE and its insureds should have access to the FTC and be able to rely on its precedents to remedy unlawful acts. I believe an exemption for professionals would have an adverse impact on the ability of private employers to control rising health care costs.

The CHAIRMAN. Thank you very much.

Mr. Angoff?

Mr. ANGOFF. Mr. Chairman, Senator Gorton, I am Jay Angoff. I am a lawyer with Congress Watch and I appreciate the opportunity to testify here today.

I think its evident that the AMA and the engineers have changed their tone from what they were asking for last year, and I think they have also changed their substance to the extent that they now recognize that the FTC does have jurisdiction over the professions. But I do not think that they have changed the substance of what they are asking for.

For example, last year, Dr. Boyle told the House subcommittee, and I quote from page 417 of the House hearing record last year: "The FTC has injected the kind of mentality that says, in effect, if you have graduated from high school, you should be able to declare yourself to be a neurosurgeon."

Now, the AMA no longer makes statements like that. What they do say, though, and what the engineers say, is that just by having the FTC there, with professionals knowing that the FTC can challenge anticompetitive activity, it can chill, it can discourage, professionals from engaging in socially beneficial activities that did not violate the antitrust laws such as peer review procedures, or setting ethical standards.

The answer to this, though, is that there is nothing in the existing antitrust or consumer protection laws enforced by the FTC, or in any other law, for that matter, that prohibits doctors or other professionals from engaging in legitimate peer review activities.

For example, if a group of doctors want to get together and review patient complaints about unnecessary surgery or botched operations or exorbitant fees, they are perfectly free to do that under the antitrust laws. Moreover, if they really do have any questions, they can go to the FTC and get an advisory opinion. The FTC, in fact, just issued an advisory opinion to the Iowa Dental Society very recently.

On the other hand, Mr. Chairman, calling something peer review or ethical standards does not make it so. For example, the famous 1975 *Goldfarb* case, in which the Supreme Court held price fixing by lawyers unlawful. In that case, the Fairfax County Virginia Bar Association had what they called an ethical standard that prevented—it said it was unethical if lawyers charged below a certain price for a title examination and, if a lawyer did charge below that price, he would be hauled up in front of the bar association and charged with violating the association's ethical rules.

Now, the bar association called this "ethics" but what it was, in fact, was price fixing, and the Supreme Court said so.

Now, similarly, the Broward County, Florida Medical Society had a rule in 1981 that prohibited doctors from advertising except for putting their name in the phonebook.

Now, Broward County is outside of Miami. There are a lot people there who speak Spanish. One doctor advertised the fact that he spoke Spanish. The medical society, though, said that he could not do that and, in fact, if you look at the fourth sheet to the last page of my testimony, you will see a page from the Broward County Medical Journal in which the president says that the principles of medical ethics in Broward County remain unchanged, and he ends by saying, "It is my hope that tradition will prevail over law."

Now, it is that kind of activity that the FTC has challenged in the past and, we think, should be able to continue to challenge.

Now, I would like to examine briefly the new proposals that the AMA and the engineers have come up with. Last year, they asked for a total, explicit exemption. This year, they do not ask for an explicit exemption, but rather for two major restrictions on the FTC that have just about the same effect as an exemption.

First, the engineers ask, and the AMA ask, for not just the FTC but also for Justice, State and local and private enforcement of the antitrust laws, all antitrust enforcement, that the FTC, in order to prevail—or Justice, or the States in order to prevail—be required to prove not just that a practice unreasonably restrains competition, but in addition that the practice is bad in some absolute, overall social policy sense.

In other words, it allows the defendant to defend on the basis that he is price fixing, or he is boycotting, but that he should be allowed to price fix or boycott because it furthers other social goals.

This is just not what the antitrust laws are about. This argument has been made and rejected for 90 years and probably most importantly, what it does, it sets up a court with the FTC as the ultimate decider of social policy, and this is what I had always thought we did not want the FTC or courts to do.

Now, there is another restriction. What they say is unless the State expressly says you cannot do something, that a professional should be allowed to do that thing. You add these two restrictions, you get a total exemption.

I would like to conclude by urging this committee to reject any special treatment for professions in the FTC reauthorization bill.

The CHAIRMAN. Thank you, Mr. Angoff.

[The statement follows:]

STATEMENT OF JAY ANGOFF, STAFF ATTORNEY, PUBLIC CITIZEN'S CONGRESS WATCH

Mr. Chairman, Members of the Committee, my name is Jay Angoff and I am a Staff Attorney with Public Citizen's Congress Watch, a public interest advocacy group founded by Ralph Nader. Public Citizen is a nationwide consumer organization with approximately 70,000 contributors annually.

In my testimony I will first explain why exempting doctors and other professionals—in whole or in part—from FTC prosecution is both bad law and bad economics. I will then discuss the position the American Medical Association last year told this Committee it was taking with respect to Justice Department, state and private antitrust prosecution of doctors, and compare it to the position the AMA has actually taken. Third, I will briefly analyze some of the proposals which the AMA, ADA and AOA have been circulating in recent weeks as alternatives to the explicit total exemption they supported in the last Congress. Finally, I will explain how the AMA's battle to gain exemption has hurt and likely will continue to hurt not just consumers, workers, businesses and other health professionals but most doctors, too.

I. BAD LAW AND BAD ECONOMICS

A. Bad law

The Supreme Court has repeatedly held that professionals, like other people, are subject to the antitrust laws. E.g., *AMA* v. *U.S.*, 317 U.S. 519 (1943); *U.S.* v. *National Association of Real Estate Boards*, 339 U.S. 485 (1950). *See also Associated Press* v. *U.S.*, 326 U.S. 1, 7 (1945) (nature of occupation not reason to exempt it from antitrust laws); *U.S.* v. *South-Eastern Underwriters Association,* 322 U.S. 533 (1944). In *Goldfarb* v. *Virginia State Bar,* 421 U.S. 733 (1975), in holding that lawyers may not fix prices, the Supreme Court eliminated any doubt that the professions are subject to the antitrust laws. The Court also emphasized that "the fact that the State Bar is a state agency for some limited purposes does not create an antitrust shield that allows it to foster anticompetitive practices for the benefit of its members."

It is equally well-settled that anticompetitive activities by professionals must be evaluated in the same way as anticompetitive activities by non-professionals: the pro-competitive effects of the restraint must be balanced against its anticompetitive effects. In *National Society of Professional Engineers* v. *U.S.,* 435 U.S. 679 (1978), in which the Court held unlawful the Society's ban on competitive bidding, the Society argued that the Court should also consider the ban's effects on social and economic values other than competition in determining whether the ban violated the antitrust laws. The Court observed that the cases "unequivocally foreclose" that argument, and characterized such an argument as "nothing less than a frontal assault on the basic policy of the Sherman Act." The Court explained:

"The assumption that competition is the best method of allocating resources in a free market recognizes that all elements of a bargain—quality, service, safety, and durability—and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers. Even assuming occasional exceptions to the presumed consequences of competition, the statutory policy precludes inquiry into the question whether competition is good or bad.

"The fact that engineers are often involved in large-scale projects significantly affecting the public safety does not alter our analysis. Exceptions to the Sherman Act for potentially dangerous goods and services would be tantamount to a repeal of the statute."

435 U.S. at 695.

Thus, under present law, professionals clearly are both subject to the antitrust laws and judged under the same standards as everyone else. The Court reemphasized and reaffirmed both these holdings only last term in *Arizona* v. *Maricopa County Medical Society,* 102 S. Ct. 2466 (1982), where it held *per se* illegal a doctor's maximum fee-setting arrangement.

Professional groups take two different approaches in arguing for an exemption despite the Supreme Court holdings in *Goldfarb, NSPE,* and now *Maricopa.* Some—like the professional engineers—argue simply that the Supreme Court is wrong, and that Congress should legislatively overrule those decisions. Those making this argument, however, have failed to produce any evidence that quality suffers when competition exists. To the contrary, the available empirical evidence suggests that competition enhances quality. See, e.g., FTC Staff Report on Advertising of Ophthalmic Goods and Services and proposed Trade Regulation Rule, May 1977.

Other professional groups make a somewhat less forthright argument. The AMA, for example, has argued that professional associations are and should be subject to the Sherman Act[1]—which is enforced by the Department of Justice and the States—but that such associations are not subject to the FTC Act, because professional associations are non-profit organizations and the FTC contains an exemption for non-profit organizations. It is well-established, however, that the FTC Act does apply to associations that serve both the business and non-business interests of their Members. *FTC* v. *National Commission on Egg Nutrition,* 517 F. 2d 485, 488 (7th Cir. 1975); *National Harness Manufacturers' Association* v. *FTC,* 268 F. 705, 709 (6th Cir. 1920). As the court of appeals pointed out in *AMA* v. *FTC,* 638 F. 2d 443 (2nd Cir. 1980), aff'd, 102 S. Ct. 1744 (1982), the AMA serves both the business and nonbusiness interests of its members. The court noted, for example, that the AMA's Articles of Incorporation provide that one of its objectives is to "safeguard the material interests of the medical profession." The court also observed that the AMA actively lobbies for legislation that it believes may be for the profit of its members—something the members of this Committee do not need to be reminded of—and renders business advice to its members. 638 F. 2d at 648.

Just as Congress has the authority to overrule *NSPE,* it also has the authority to take away the FTC's present jurisdiction over associations, like the AMA, that further both the business and nonbusiness interests of their members. But it is disingenuous at best to argue that the FTC presently does not have such jurisdiction, since the courts have unanimously held that it does.

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[1] *But see* section II, *infra.*

B. Bad economics

Economists disagree about the extent to which certain kinds of antitrust violations—such as vertical restraints or price discrimination—harm consumers. But all economists agree that there are other kinds of antitrust violations—horizontal violations—that inevitably raise prices and restrict output, and thus are and should be per se illegal.

These are exactly the kind of activities doctors have engaged in that the FTC has challenged in the past. For example, the FTC has sued doctors who threatened to boycott a hospital's emergency room if the hospital hired a doctor on a contract basis; doctors who agreed not to work below "usual" rates; doctors who refused to see patients covered by Blue Shield or Medicaid; and doctors who tried to prevent a physician in a Spanish-speaking community from advertising the fact that he spoke Spanish.[2] The FTC has also challenged doctors who tried to block a church organization from operating and publicizing a low-cost cardiac stress clinic; doctors who tried to drive a physician's house-call service in Kansas out of business; and doctors who tried to stop a physician specialist from offering an industrial medicine program to corporations for their workers.

All these activities clearly raise health care costs. Doctors who engage in such activities are, of course, a small minority; most doctors would surely deplore them. Yet all these practices—which yield no economic benefit but impose great costs—would as a practical matter be immune from FTC challenge under both the total exemption contained in last year's Luken-Lee bill and the new proposals supported by the AMA this year.

The health care industry is now a $300 billion industry accounting for almost 10 percent of our gross national product. It needs more competition, not less. Exempting it from FTC prosecution, or subjecting it to a weaker standard than other industries, makes no economic sense whatever.

II. THE AMA HOUSE OF DELEGATES RESOLUTION

On April 20, 1982, a Mr. Newton Minow on behalf of the AMA told this Committee,

"Let me emphasize at the outset that we are not here to advocate exempting the professions from the federal antitrust laws. . . . We believe that actions in the federal court by the Department of Justice and by states and private individuals are appropriate and effective means of dealing with such conduct."

In June, 1982, on the other hand, the AMA House of Delegates passed a resolution supporting "draft legislation amending the Sherman and Clayton Acts at the federal level and amending state antitrust laws." [3] The bills drafted by the AMA's Council on Legislation and approved by the House of Delegates are similar to the proposals the AMA is currently circulating with respect to the FTC, except that they would apply to the Sherman and Clayton Acts and state antitrust laws rather than merely the FTC Act. They would exempt health care professional from both the *per se* test and rule of reason test in *all* antitrust cases—whether brought by the federal government, state or local governments, or private parties.

As explained more fully in section III, such exemptions would as a practical matter make proving an antitrust case involving health professionals next to impossible.

The action taken by the AMA House of Delegates last June makes it clear that the FTC exemption the AMA seeks is only the first step, and that its real goal is to gain an exemption from all antitrust law—whether enforced by the FTC, the DOJ, state and local governments, or private parties—despite Mr. Minow's statement before this committee to the contrary.

III. NEW EXEMPTION PROPOSALS

Professional groups seeking exemption apparently realize that this committee is not likely to approve a bill that expressly exempts doctors and other professionals from all FTC scrutiny, as last session's Luken-Lee bill did. They therefore have informally circulated other proposals that seek to accomplish the goals of a total exemption but by imposing a series of restrictions on the FTC rather than by explicitly exempting professionals. Such proposals fall into four major categories. An analysis of each kind of proposal follows.

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[2] See Attachment A.

[3] See Attachment B.

1. Proposals to exempt professionals from both the *per se* and rule of reason tests for antitrust violations. Such proposals would substitute a test whch would require the FTC to consider values other than competition—for example, whether a practice is "designed to protect, maintain or improve the quality, safety, effectiveness, availability or accessibility of professional service"—in determining whether a business practice violates the antitrust laws.

In this category fall the proposal the AMA has been circulating this year, the draft legislation approved by the AMA House of Delegates that would apply to all antitrust law, and the design professionals proposal that would apply to all antitrust law. The Supreme Court resoundingly rejected such proposals in *NSPE,* where it characterized them as "frontal assault[s] on the antitrust laws."

It has long been established that there are two tests for determining whether a business practice violates the antitrust laws. One test, known as the per se test, is used for judging arrangements that inevitably harm competition while providing little or no benefit to competition. Such practices include, for example, division of markets, *United States* v. *Topco Associates, Inc.*, 405 U.S. 596 (1972); price fixing agreements, *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S 150 (1940); group boycotts, *Fashion Originators' Guild of America, Inc.* v. *Federal Trade Commission,* 312 U.S. 457 (1941); and tying arrangements, *International Salt Co.* v. *U.S.*, 332 U.S. 392 (1947). As the Supreme Court explained in *Northern Pacific Ry. Co.* v. *U.S.,* 356 U.S. 1 (1958), these practices "because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use."

Other restraints on competition, on the other hand, are judged by the rule of reason. Under the rule of reason, the pro-competitive effects of a particular practice are weighed against its anticompetive effects. Restraints judged by the rule of reason—which may or may not be unlawful depending on the facts of the particular case—include vertical territorial restrictions and mergers. See generally *Continental T.V.* v. *GTE Sylvania,* 433 U.S. 36 (1977).

The AMA-NSPE proposals would go beyond the rule of reason test, however, and require courts and the Commission not only to balance pro-competitive vs. anticompetitive effects but also to weigh other social values. Antitrust experts agree that such an analysis has no basis in antitrust; it would involve the courts and the Commission in a standardless inquiry. As a practical matter, the plaintiff could rarely, if ever, prevail if such an analysis were required. As one of the nation's foremost antitrust authorities wrote to the committee last year, requiring the courts or Commission to weigh social values other than competition "would make the application of antitrust principles to the professions so burdensome and uncertain as to be virtually inadministrable." [4]

Finally, there has been no showing that the per se and rule of reason tests have caused consumer injury. The quality of legal service did not suffer after *Goldfarb.* Bridges did not fall down after *NSPE.* The quality of health care has not suffered since *AMA* v. *FTC.* Unless professional groups can come forward with substantial empirical evidence convincingly demonstrating that judging alleged antitrust violations under the per se and rule of reason tests substantially harm the public, any consideration of the AMA/NSPE proposal is, to say the least, premature.

2. Proposals that exempt from FTC scrutiny activity that "conforms with" or is "permitted by" state law.

Such proposals would prevent the FTC from challenging activities that are not expressly prohibited by state law. For example, some states do not expressly prohibit doctors from fixing prices or from engaging in fraud and deception. In such states, therefore, price fixing, fraud, and deception engaged in by doctors would be immune from FTC challenge.

3. Proposals which exempt "non-profit professional associations" from the FTC Act.

These proposals exempt from FTC scrutiny all unfair methods of competition and all unfair or deceptive acts or practices engaged in by professionals as long as such activity is undertaken through the association.

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[4] Letter from Lawrence A. Sullivan, Earl Warren Professor of Law, Boalt Hall, to Congressman James J. Florio, May 12, 1982. Professor Sullivan further explained:

The litigation and counseling process would be exceedingly cumbersome. Empirical problems would be overwhelming. There would seldom if ever by any way to quantify the supposed public benefits that arguably off-set loss of competition. Any effort to do so would lead to sheer speculation. . . .

4. Proposals which would restrict the FTC's jurisdiction over restaints on the place and manner of practice of professionals.

Such proposals would allow professional associations to prevent duly licensed and qualified professionals from practicing where they wanted, e.g., in a shopping center, or in the manner they wanted, e.g., independently or in a group. There is no principled justification for immunizing such activities from FTC scrutiny.

IV. AMA OFFICIALS V. DOCTORS

It is not secret that the exemption the AMA seeks would seriously injure consumers of health care—whether businesses, labor unions, or individual citizens. But it is equally true that the AMA's battle has also injured other doctors, and could continue to injure them in the future, in at least 3 different ways.

First, as the attached chart indicates,[5] the average doctor is today doing quite well. In 1981 the average doctor earned $86,210; two out of five doctors earned more than $100,000. Presumably, the typical doctor simply wants to practice medicine. He may well find the AMA's effort to obtain an exemption from FTC jurisdiction a far bigger annoyance than the FTC itself.

Second, as a result of their effort to exempt doctors from FTC scrutiny, AMA officials in Washington and Chicago have created a tremendous amount of negative publicity for doctors across the country—at the same time, ironically, that individual doctors are engaged in such heroic pursuits as inventing an artificial heart or teaching paralyzed people to walk. Unfortunately, AMA officials have brought dishonor and disrespect on a profession that warrants a great deal of honor and respect.

Third, by concentrating so much time, effort and money on one narrow special-interest issue, AMA officials would seem to be ignoring much broader, more important issues that truly affect their members. Doctors surely have a professional interest in health and safety legislation; yet we do not find AMA lobbyists aggressively seeking such legislation. On a somewhat more mundane and pragmatic level, doctors certainly have a pecuniary interest in such issues as prospective payment or Medicare. Yet we still see AMA lobbyists using up enormous amounts of their members' resources fighting for an FTC exemption.

In short, Mr. Chairman, the AMA is a bureaucracy that is subject to the same failings as government bureaucracies. Not intentionally, perhaps, but simply because of the nature of bureaucracy, officials in both trade associations and government may sometimes end up seeking to further their own careers rather than the interests of the people they are supposed to be representing. This seems to be exactly what is happening today with the AMA. This committee would be doing everyone a favor—consumers, workers, businesses, and most doctors, too—if it rejected the AMA's appeals for special treatment and continued to subject doctors and other professionals to the same antitrust and consumer protection laws as everyone else.

CONCLUSION

In conclusion, Mr. Chairman, we realize the members of this Committee, like the members of the FTC, may differ on how broad the scope of the FTC's authority should be. But I know all members of the FTC—and I hope all members of this committee—can agree that once the scope of the FTC's authority is defined, the laws must apply equally to all sectors of the economy.

We strongly urge this committee to reject any provision that would grant professionals special treatment under the FTC Act.

ATTACHMENT A

BCMA NEWS LETTER,
June 1981.

DEAR COLLEAGUE:

YELLOW PAGE ADVERTISING

Your Exective Committee for years has been waging a campaign against unwarranted listings in the Yellow Pages. The primary reason is that we do not believe such flagrant listings are ethical, for ours is a profession is which dignity is and should be one of our foremost tenets.

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[5] See Attachment C.

The BCMA, as a guardian of the highest principles in medicine, had asked those who broke our unwritten code to appear and offer explantation. Names henceforth will be published in THE RECORD.

The most frequent excuse is a plea of ignorance; that an office girl was responsible.

Come September you will be called again by those who market space in the Yellow Pages. It would behoove you to advise your staff that you alone are responsbile for what appears in those listings, and that they must be cleared by you personally. Better that than to suffer the ridicule of your pears!

ON PROFESSIONAL LIABILITY

All insurance codes, including professional liability, is due for review in 1982 by the Florida Legislature.

We have scheduled a special September session on the subject risk mangement with PIMCO and you will be kept advised as plans are formulated.

IMPAIRED PHYSICIANS PROGRAM

Member volunteers are being sought for a BCMA committees to work with the Florida Medical Foundation-Florida Medical Association Impaired Physicians Program. Such volunteers will serve primary physicians in their area to monitor physicians who have completed treatment and are returning to their local county.

If you are interested in serving, please contact Bill Stafford at the BCMA offices, (525-2142).

IRISH TRIP CANCELLED

The proposed golf-sightseeing trip to Ireland in August has been cancelled because of lack of participation. Time obviously was too short. We will start at year's end to line up a trip for next July, hoping that this will give more members an opportunity to plan ahead and thus be able to participate.

BCMA TELEVISION SHOW

We have ceased taping our half hour medical show on HBO Channel 25 for the summer but will resume in September. Plans are in process to televise these shows in the Plantation and Hollywood areas futurely, Members interested in appearing on the program when taping is resumed are urged to contact Public Information Director Oscar Fraley (527-0778) for a list of shows we already have done so that you may come up with a new approach.

This is my opening news letter as your new president and I will strive to keep you fully informed of everything we are doing in your interests at the BCMA.

ATTACHMENT A—BROWARD COUNTY MEDICAL ASSOCIATION RECORD, MAY 1981

I was encouraged by the recent publication of the telephone book yellow page directory. In spite of a dishonest campaign by certain employees of Southern Bell Telephone Company to induce physicians to alter their yellow page listings, a relatively small number of BCMA members responded contrary to our association's Code of Ethics. Those physicians who took advantage of the opportunity to alter their listing and/or subscribe to a small ad in the yellow pages will be summarily called before the Executive Committee of the BCMA to explain their actions.

Let there be no doubt that in spite of the Federal Trade Commission's contention that restriction of advertising is tantamount to restraint of trade, the "principles" of medical ethics in Broward County remain unchanged. Exceptions to the standard yellow page listing, including bold face type, will continue to represent conduct unbecoming to a professional.

It is my hope that tradition will prevail over law.

PHILIP A. CARUSO, M.D., *President.*

[Attachment B]

REPORT OF THE BOARD OF TRUSTEES

Subject: Remedial Antitrust Legislation (Resolution 9, I-81).
Presented by: Joseph F. Boyle, M.D., Chairman.
Referred to: Reference Committee B (Malcolm O. Scamehorn, M.D. Chairman.

Resolution 9 (I-81), which was referred to the Board of Trustees, calls upon the AMA to seek enactment of federal and state legislation that would recognize that certain reasonable activities in the health care field do not violate antitrust laws.

The Board concurs with the Council on Legislation, which has studied this matter carefully, that the intent of this resolution can be carried out by development of draft legislation amending the Sherman and Clayton Acts at the federal level and amending state antitrust laws. Draft legislation applicable to the sale and delivery of health care services has been developed to accomplish this reform.

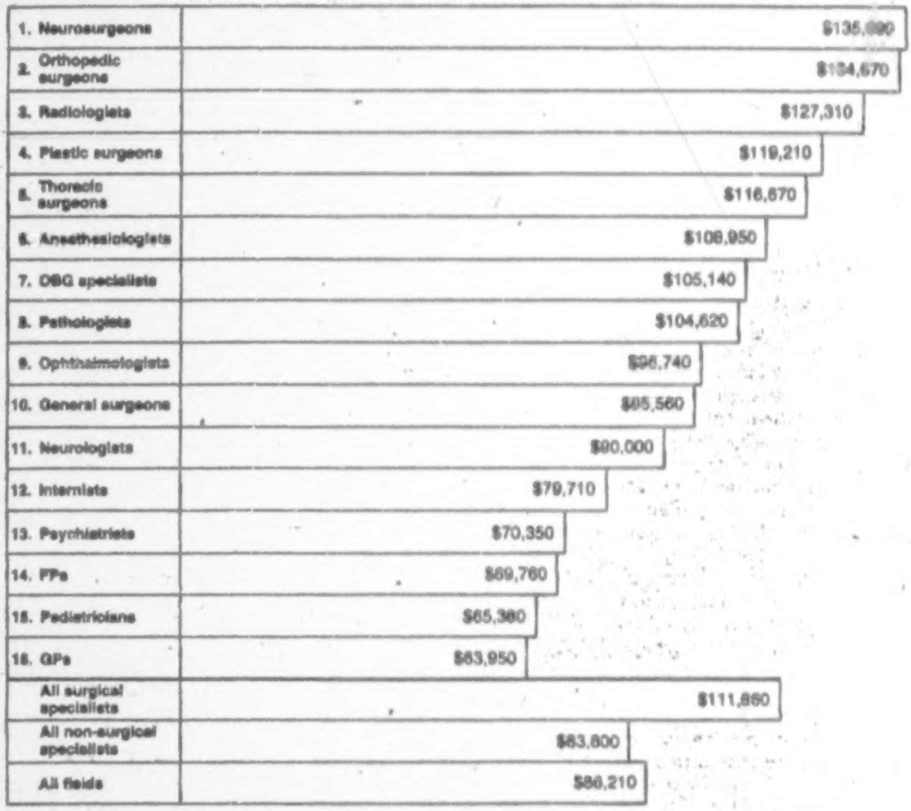
The Board has approved two model bills recommended by the Council on Legislation to amend federal and state antitrust laws. These bills would require courts reviewing antitrust cases involving the sale or delivery of health services to consider whether the activities are directed, authorized or encouraged by the federal or state government, whether the activity is intended to maintain or improve the quality of health care in the public interest, and whether the activity is intended to control costs in the public interest.

The Board recommends adoption of this report in lieu of Resolution 9.

ATTACHMENT C—MEDICAL ECONOMICS ANNUAL SURVEY OF DOCTORS' INCOME, SEPTEMBER 1982

HOW 16 SPECIALTIES RANK IN PRACTICE EARNINGS

Of the 16 fields of office-based practice studied individually in the survey, the top 10 in terms of earnings are either surgical or "hospital" specialties (radiology, anesthesiology, and pathology). Now heading the list in terms of pre-tax net per M.D. are neurosurgeons, who earn slightly more than orthopedic surgeons; the reverse was true in 1979. Note that the median earnings of both specialties are more than double those of GPs.



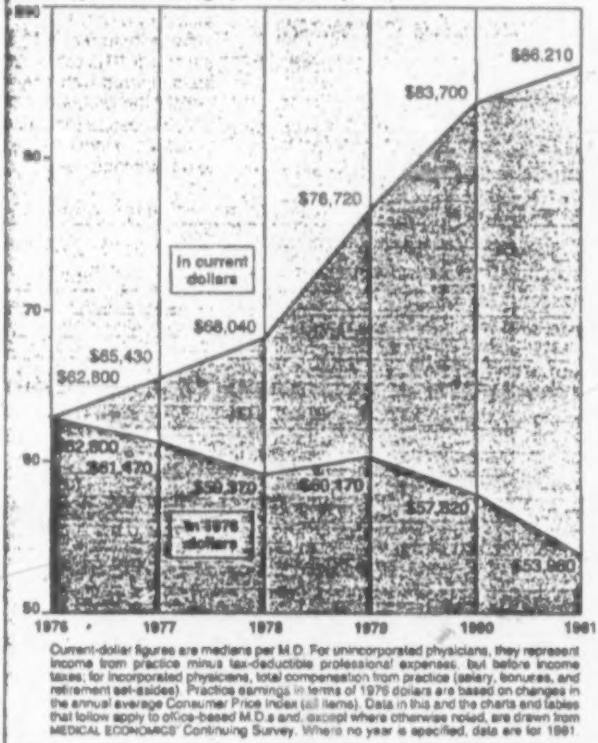
There's a better than even chance that your practice netted you at least $80,000 before income taxes last year. But it's also likely that this represented either an insignificant gain or an actual decline from the previous year's earnings.

That, at least, was the experience of office-based M.D.s who participated in our 1982 Continuing Survey, which provides separate data for 16 major specialties—the largest number in 14 years. The surveyed doctors' 1981 gross receipts were up 7 percent from the previous year, but their earnings after expenses rose only 3 percent—the smallest percentage gain in a decade.

And even this was reduced by higher taxes. Assume that a married doctor with two children filed joint federal income tax returns for 1980 and 1981. In each of those years his deductions equaled 15 percent of his income, which was entirely from practice. Assume further that in each year his earnings coincided with the median for all office-based M.D.s—$83,700 for 1980 and $86,210 for 1981. For 1980, then, his federal income tax was $23,250, and for 1981 it was $24,317. So his income gain of $2,510 shrank to $1,444, or 2.4 percent, after federal taxes. And even this was turned into a significant loss of purchasing power by a year-end-to-year-end rise of 8.9 percent in the government's

HOW PHYSICIANS' BUYING POWER HAS WEAKENED IN FIVE YEARS

Inflation, which appears to be decelerating now, hit double-digit levels in three of the past five years. Thus last year's dollar bought only 83 percent as much as the 1976 dollar. Over that five-year period, office-based M.D.s' annual practice earnings increased by a median of $23,410, or 37 percent. Yet those higher earnings represented a five-year *drop* of $8,840, or 14 percent, in total buying power—even before income taxes.



Current-dollar figures are medians per M.D. For unincorporated physicians, they represent income from practice minus tax-deductible professional expenses, but before income taxes; for incorporated physicians, total compensation from practice (salary, bonuses, and retirement set-asides). Practice earnings in terms of 1976 dollars are based on changes in the annual average Consumer Price Index (all items). Data in this and the charts and tables that follow apply to office-based M.D.s and, except where otherwise noted, are drawn from MEDICAL ECONOMICS' Continuing Survey. Where no year is specified, data are for 1981.

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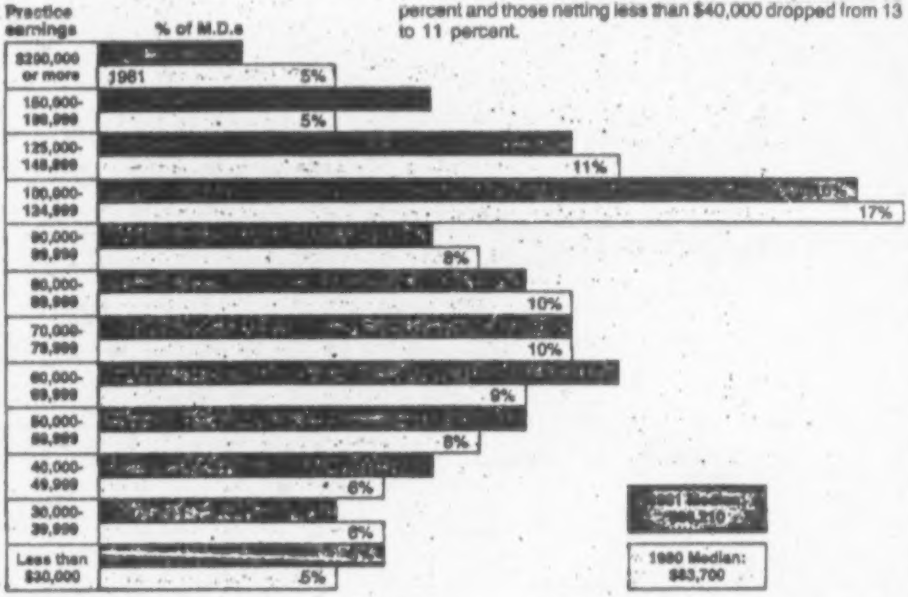
Consumer Price Index (all items).

It apparently wasn't for want of trying that private physicians failed to make any real economic progress last year. Their fees, according to the CPI, went up 11.7 percent. That's more than in any year since 1975 and more than the 1981 cost-of-living rise. What's more, the doctors held their median professional expenses to a mere 1.1 percent more than in the preceding year.

Then what has gone wrong? The most telling negative factor has been a continuing decline in the number of patient visits. During a representative workweek in the spring of this year, fee-for-service physicians saw 6 percent fewer patients than a year earlier and 14 percent fewer than during a comparable week in 1978. Accentuating this downtrend, of course, is the present recession and the resultant tendency of patients to avoid seeing their doctors any

TWO OUT OF FIVE DOCTORS NET $100,000 OR MORE

Overall, surveyed doctors' practice incomes after expenses rose only 3 percent last year, as compared with 9.1 percent the year before and 12.8 percent the year before that. Even so, one in 10 practitioners netted at least $150,000 last year, as compared with only one in 12 in 1979. In that two-year period, the proportion of surveyed doctors clearing at least $60,000 before income taxes climbed from 68 percent to 75 percent and those netting less than $40,000 dropped from 13 to 11 percent.



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more than absolutely necessary.

The problem is worsened by growing competition from a still-expanding surplus of physicians. Over the past three years, the number of M.D.s and D.O.s in active patient care has increased 11 percent—over the past six years, 29 percent. Even frequent and sizable fee boosts have so far proved inadequate to offset these trends. The fact that more than 5 percent of our 1982 office-based respondents were working as salaried employees of other physicians may reflect the increasing difficulty of making a go of fee-for-service practice.

Last year's net-income rise of 3 percent naturally doesn't apply across the board. The change was greater in some specialties, regions, and types of practice, and smaller in others. Few practitioners, however, managed to boost their earnings enough to nullify the year's inflation. An exception is non-surgical specialists, who gained a median of 8.9 percent. Internists' incomes went up 7.3 percent, and surgical specialists as a whole registered an increase of 6.8 percent, according to the survey. Among those who lost ground in terms of net earnings before income taxes were FPs (down 3.9 percent), pediatricians (down 3.1 percent), general surgeons (down 1.6 percent), and GPs (down 1.4 percent). There were also declines in median net in three of the nine census regions.

For more details, see the charts, tables, and commentaries on the following pages.

NET EARNINGS ARE STILL HIGHEST IN THE MID-SOUTH

Traditionally low-earning New Englanders again recorded the lowest net of any region last year, but they had the biggest 12-month percentage gain—6.9 percent. The Mid-South, with the highest median net, was one of three regions that lost ground. Earnings there fell 2 percent from their 1980 level, while doctors in the Southwest lost 9.8 percent and those in the Far West lost 1.2 percent. Only in New England did the year's income gains fully offset the 8.9 percent inflation rate. Median net climbed 8.1 percent in the Mid-East, 7.8 percent in the Plains states, 7.4 percent in the South Atlantic region, 4.9 percent in the Great Lakes states, and 0.5 percent in the Rocky Mountain states.

Gross represents physicians' individual shares of 1981 receipts from practice before professional expenses and income taxes.

Far Western states (including Alaska and Hawaii)

	Gross	Net
WEST	$137,610	$82,360
Rocky Mountain states	$138,440	$83,060
Far Western states (including Alaska and Hawaii)	$135,710	$80,630

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The **Chairman** Dr. Boyle, I am curious. In your statement, you say that the Senate had no chance to vote directly on a professions exemption. Although we did vote on the McClure amendment, it was a tabling motion. Do you mean that because we tabled it, it was not a direct vote?

Dr. **Boyle**. We do not believe that the Senate—I am not a Senator or a Member of the U.S. Senate, but it is our impression that the Senate did not vote up or down on that amendment, yes, sir.

The **Chairman**. Well, you do realize that many, many, many of the matters we consider in the Senate are disposed of substantively by tabling, and everybody who watches the Senate understands that that is indeed a substantive vote.

Dr. **Boyle**. Fine. I would not want to——

The **Chairman**. I think most of us consider that we had a substantive vote on the issue, and I do not want to leave you with the impression, or have you leave others with the impression, that you think we did not actually face the issue.

Indeed, we did. We had lots of lobbying, lots of debate, and voted. It was a tabling motion, but that was not uncommon.

Let me ask you, Doctor, for some specific examples of instances in which the medical associations have been discouraged from pursuing legitimate public interest activities because of FTC action?

Dr. **Boyle**. There have been a fairly large number of local medical associations who, upon advice of legal counsel, have discontinued peer review activities in areas that concern charges by local physicians, or have been discouraged by legal counsel, from pursuing activities intended to protect the public from fraudulent and deceptive practices in certain instances. The plastic and reconstructive surgeons have done this.

There have been a number of associations that have declined to adopt standards that would apply to practices within hospitals in areas of obstetrics and gynecology and cardiology because they have been advised that these kinds of activities—their perception of these kinds of activities—may be subject to the jurisdiction of the Federal Trade Commission.

Now, while this may seem, in today's climate, with today's Commission, a little farfetched, it was not too long ago that the Federal Trade Commission, under a previous chairman, did institute an action against a national specialty society challenging a requirement that before people could be admitted to that society they must have completed an adequate training program and passed an examination—practical and written—to demonstrate their competence to perform surgery.

Now, if these are the kinds of activities that can come under the scrutiny of the Federal Trade Commission, since the activities we are talking about are entirely voluntary by local associations, State medical associations, and specialty societies and their members are increasingly reluctant to expose themselves to risk with respect not only to money loss but also risk with respect to professional stature and standing.

The **Chairman**. Can you come back again and be a little more specific, though? I am curious about which associations, and what happened. You kind of generically gave an answer, and I am looking for some specifics. Who did you contact in the FTC? Did you ever ask their opinion?

Dr. BOYLE. I can, if you like, bring back for you the names of specific local medical associations that have been discouraged from these kinds of peer review activities. I cannot give you those names this morning.

The CHAIRMAN. All right. Could you do this? Could you bring them back and could you find out for me from them if, indeed, they ever talked to anybody of the FTC at all or asked any opinion? The FTC is perfectly willing to advise, and is advising, different associations what is and is not legal in their estimation and it is working out pretty well with some associations, and I am curious whether the AMA, or at least these local groups—I should not say the AMA—attempted any contact with the FTC at all?

Dr. BOYLE. Senator, most of these associations have had available to them the advisory opinion from the FTC to the Iowa Dental Association. Most of them have read this carefully and recognize that while that advisory opinion says that peer review activity is entirely permissible, it then in the body of that advisory opinion, goes on to define ground rules which are fairly restrictive.

The final paragraph simply says these ground rules are subject to change anytime FTC sees fit. So medical societies are aware of that.

The CHAIRMAN. But perpetually, citizens in this country are asking the Federal Government for advice. You go to the IRS and you ask them how to fill out your tax form. You call them up on the phone. You call the OSHA inspector and say I want you to come out and take a look so you make sure I am in compliance with the OSHA regulations.

What I am curious about is whether or not physicians tried to contact anybody in the FTC and said, here is what we would like to accomplish and we do not want to run afoul of the law. How do we do it? Can we do it?

Dr. BOYLE. Senator, the American Medical Association has had over the past month or more, extensive discussions with the Chairman of the Federal Trade Commission and members of his staff. As a matter of fact, in our discussions with him, the chairman and his staff have acknowledged that there is a legitimate role for the professions in self-regulatory activities and have acknowledged that their own advisory opinions and their own order could be interpreted as severely restricting such activities, and they have acknowledged that we really need to find some way of defining the line which this current Commission believes should be drawn between business and commerce and standard setting and the quality of care and medical practice.

They have acknowledged that to us.

The CHAIRMAN. Now, Doctor, I am going to ask the question a third time.

Dr. BOYLE. Yes, sir.

The CHAIRMAN. Will you listen to it?

Dr. BOYLE. Yes, sir.

The CHAIRMAN. Will you talk to those local medical associations and find out if they contacted anyone in the Federal Trade Commission and asked their opinion as to what they wanted to do? I know you have been meeting with Jim Miller. I have been talking with him. I talked with him several times last week. I know what your position is. I am looking for specific facts.

Dr. BOYLE. Yes, I will ask them, sir.

The CHAIRMAN. Thank you.

Senator Gorton?

Senator GORTON. Dr. Boyle, I want to start with exactly the same subject with which the chairman has started his questioning of you. I read and listened to your testimony and read the sentence, "but under the time pressures of the lame duck session, the Senate did not vote on the matter directly." I am sure that the chairman will be happy to keep this record open long enough for you to name one Senator who did not know what he was voting on last December.

This disturbs me, because it seems to me that, either on your behalf or in your messages to your membership, you are dealing in a dream world, dealing in some of the kinds of things that regretably we feel that we have gotten from the AMA during the course of this entire matter.

And I am now quoting from Mr. Angoff's testimony here, less than a year ago, your representative told this committee—and I am quoting, "Let me emphasize at the outset that we are not here to advocate exempting the professions from the Federal antitrust laws. We believe that actions in the Federal court, by the Department of Justice and by the States and private individuals are appropriate and effective means of dealing with such conduct." And, as a matter of fact, we were hearing that from AMA representatives right up to our vote in December.

And yet, at the same time, we discovered that your house of delegates last June supported draft legislation amending the Sherman and Clayton Acts at the Federal level, and amending State antitrust laws to exempt health care professionals from both the per se tests and the rule of reason tests in all antitrust cases, whether brought by the Department of Justice, State, and local governments, or private parties.

Now, what is your position? Have you changed that? Are you now for the aggressive enforcement of antitrust laws against the professions by the Department of Justice and by the States, or are you continuing to get those laws changed as well as the Federal Trade Commission Act?

Dr. BOYLE. Senator, at the outset, I hope it is clear in everybody's mind that the American Medical Association and all of our State associations, local physicians as well, do not support price fixing, boycotts, illegal kickbacks, or any of those kinds of activities. We believe that in those areas, we most certainly are subject to all of the provisions of the antitrust laws.

Our house of delegates did adopt a policy statement submitted to them by the board of trustees. In addition to that, they did approve the provisions of a model bill. I will simply read to you what that model bill says because it does not provide an exemption from anything, but rather it requires the courts to consider whether a restraint related to the sale or delivery of health services affecting interstate commerce is reasonable.

The criteria to be considered shall include: One, whether the activities involved are authorized or encouraged by the Federal or a State government; two, whether the activities involved are intended to maintain or improve the quality of health care in the public interest; or three, whether the activities involved are intended to control costs in the public interest.

Now, that is all that we said. We said the courts should have that information in front of them. The court can completely ignore what the claim may be. The bill would simply allow the court to consider whether a standard which has been adopted to protect people from dying or being maimed by certain kinds of unsafe practices in a hospital was reasonable.

Senator GORTON. Mr. Angoff, Mr. Goldbeck, would you like to comment on that?

Mr. ANGOFF. Yes, I would like to comment. Dr. Boyle is not a lawyer, and I am sure what he says is not said in bad faith at all. But by putting that standard into the law, you change the antitrust laws from a law about competition to some broad, social policy law.

For example, to take his second criterion, it is whether the activity is intended to maintain or improve the quality of health care in the public interests. That would permit, for example, the Broward County Medical Association in Florida to argue that they are preventing the doctor from advertising the fact that he speaks Spanish to Spanish-speaking people is really intended to maintain or improve the quality of health care, and it would allow a court, or the FTC if it had the same notion of social policy, to agree with the medical society.

So what it does, it is true that technically it is not a total exemption from the antitrust laws, but what it does is to find out, to exclude from the antitrust laws things like the Broward County medical society's restriction on advertising or, for that matter, the ethical standards that the *Goldfarb* case held, that they were legal, per se.

Mr. GOLDBECK. Senator, yes. I want to reiterate our position. We do not believe that the antitrust laws should be changed so that those social factors are made criteria for judges' or the FTC's consideration. It is particularly important to note that there are no formalized, publicly available standards against which one can come up with measures of quality and cost containment.

There is nothing to which a judge, the FTC, or a Senate committee can refer, to say, "Ah, it meets the standard of quality or the standard of cost containment." Indeed, the very wording of the AMA proposed language change in the law indicates that decisions should revolve around the issue of whether it was "intended" to improve quality, or "intended" to improve costs.

I cannot imagine a case where someone who was facing charges in an antitrust case, in any business including our companies that I try to represent, which would not be quite happy to get out from under all prosecutorial charges, or all future restraints by simply saying that they intended to do well.

So we should not believe that such change would be a progressive change. You can go back to the 1940's when there were cases where physicians were saying that group practice was, by definition, not going to be good for the quality of the patient.

You can bring it all the way up to physician dominance on Blue Shield boards, on hospital restrictions against employment of certain categories of providers, on insurance restrictions against reimbursement for certain categories of providers. The same excuse was always provided: Quality of care. In fact the AMA proposed change would be bad quality.

The **CHAIRMAN**. I might say I can come up even further than that. When I came to the Senate, Kaiser was a large provider of health care; it is the sixth biggest employer in Oregon. When I came here, doctors who worked for Kaiser were not allowed to belong to most of the voluntary medical associations. They, of course, were licensed by the State as a profession, but the volunteer associations would not allow them to join.

Senator Rudman has joined us, and of course, as a matter of comity, even though he is not a member of this committee, we are pleased to have him join us. All of the committees will allow, on occasion, other members to come. As many of you may be aware, Senator Rudman does have a slight interest in this particular subject.

Warren, we follow a first-come, first-serve rule on questions, and Senator Lautenberg is next.

Senator **LAUTENBERG**. Mr. Chairman, I am willing to yield to Mr. Rudman. I will take up my questions after his.

The **CHAIRMAN**. I am not sure you can yield him your time.

Senator **LAUTENBERG**. I will not yield my time. May I yield my order, though?

The **CHAIRMAN**. You may yield your order.

Senator Rudman?

Senator **RUDMAN**. Thank you very much, Mr. Chairman.

Dr. Boyle, I notice in reading your statement that you indicate support for the limitations contained in my amendment last year, but you add that there ought to be additional unspecified limitations.

I wonder if you could tell the committee what additional limitations you are seeking and, for each limitation that you wish to specify, can you give me a specific case of an FTC action, or proposed action, that has had a harmful effect on the quality of care provided to the public which your specific limitation would address?

Dr. **BOYLE**. We believe, Senator, that it would be desirable to include specific language which would indicate clearly that the Federal Trade Commission should not become involved in activities involving the accreditation of medical schools, or schools of training programs. A specific action that had been taken by the Federal Trade Commission in the past was an effort made by the FTC some years ago to petition the Commissioner of Education to remove recognition of the Liaison Committee on Medical Education as the recognized accrediting body for U.S. medical schools. In addition, the FTC instituted an action against the Association of Plastic Surgeons concerning their requirement that a physician be board certified as a condition of membership.

We believe that there should be more specific language in the FTC law that relates to the activities of State regulatory bodies. With respect to professions, we believe that it should be very clearly stated, that in actions before the Federal Trade Commission, those concerns which we have expressed with respect to the application of antitrust laws also be taken into consideration.

There may be other areas as well, but I believe that those are several areas in which we think the language could be more specific.

Senator **Rudman**. You stated in your statement, "Responsible self-regulatory activities are appropriate roles for the professions." I agree with that philosophically. The problem revolves around the definition of responsible.

It exists because some self-regulatory activities have been blatant restraints on trade. For example, the *Broward County* case, which has previously been discussed.

I do not think that we can trust any organization, because of its self-interest, to make determinations as to when self-regulatory actions are responsible. I do not think, in this free society, we can allow that much freedom. I am really at a loss to understand why the AMA was so actively opposed at our conference to accepting the amendment which passed the Senate by such an overwhelming majority, particularly since it dealt with the very problem that many doctors had addressed to me, and that was the override provisions.

I believe in States rights and the States ability to regulate themselves, but I disagree with many of the other health care groups in this particular area.

But that was a very good amendment. I do not see why they did not take it and run.

Dr. **Boyle**. Senator, in our perception, that amendment did not meet many of our concerns. That is why.

As I have indicated, we believe that language comparable to what I have just discussed will be reported by this committee to the full Senate and, ultimately, the entire Congress.

Senator **Rudman**. I take it, then, you have given up on any effort to totally take away from the FTC their power to regulate anticompetitive practice.

Dr. **Boyle**. We believe that the courts have made that decision, and we accept that.

Senator **Rudman**. Mr. Chairman, let me thank you very much for allowing me the privilege of serving on your committee this morning as an informal member. I understand Senator Gorton asked the question before I got here about your efforts to exempt yourselves from the States at the same time that we were being asked to exempt you up here.

I have documents from the American Medical Association indicating a strong effort to simultaneously in the 1983 sessions of the State legislatures very substantially limit the antitrust authority of State attorneys general. I thought that was kind of having it both ways, Dr. Boyle, or maybe I misunderstood that. Could you explain that to me?

Dr. **Boyle**. It was not an attempt to have it both ways. As a matter of fact, we did not ask for any limitation on the authority of

State attorneys general, nor the U.S. Department of Justice, for that matter. What we did say was that in actions that were brought concerning activities of professional associations that the courts be required to include evidence or consideration as to whether or not these activities were authorized or encouraged by Federal or State law, whether or not they were activities which were entered into to improve the quality of health care or protect the public interest to serve as the public's advocate, or whether these activities were intended to assist in the control of the escalation of health care costs—or even where everyone has substantial concern. That is all.

That does not, in any way, say that the professions would be allowed to have an exemption but rather that the court could hear evidence on those issues and consider such evidence in making its decision. A court could decide to ignore the evidence if it wanted.

But let me give you an example of the kind of standard setting that we are talking about, which may have a very substantial impact on the future health of the people of this country.

The American College of Obstetrics and Gynecology has adopted standards with respect to how many deliveries should be performed in the hospital in order for that hospital to be considered a safe place for babies to be born. That could exclude some hospitals, or could work to the disadvantage of the medical staffs of some hospitals.

The American College of Cardiology likewise has adopted standards with respect to how many diagnostic angiograms should be performed in a hospital before that is considered a place where it should be done, or how many bypass surgeries ought to be performed each year before that can be considered a safe place to have that kind of surgery.

Now, we are not just talking about somebody picking something out of the air. Only after a very careful evaluation of the data has demonstrated that the mortality in those institutions may be as much as 35 percent over and above the expected mortality in another institution is such a standard considered.

These are the kinds of standards we are concerned about. We are not concerned about trying to keep prices up in some areas. We are concerned about the opthalmologist who will charge some poor young lady something on the order of $5,000 or $6,000 for surgery to correct a child's strabismus when a reasonable charge for that correction may have been $400 or $500.

These are the kinds of activities that I think the Congress would accept. These are responsible activities by local professional associations serving as the advocates to protect the public.

Senator RUDMAN. I would simply say——

The CHAIRMAN. Warren, we follow the 5-minute rule here, also.

Senator RUDMAN. I really do not have much more to say. I do have a statement and, when you are ready, I would like to present it.

The CHAIRMAN. When the panel is done, I will put you on.

Senator LAUTENBERG. May I have my time?

The CHAIRMAN. Oh, you want your time back now? All right.

Senator LAUTENBERG. I did not give it away. I loaned it.

The CHAIRMAN. Go ahead, Frank.

Senator **Lautenberg**. Thank you very much, Mr. Chairman.

Dr. Boyle, I am sorry I was not here to listen to your testimony. Of course, we reviewed it and I am sure that you, like we, would like to see the lowest cost of high-quality medical care and health care, delivered to our communities. I have had some involvement in this area. I served on the board of a major regional hospital in New Jersey. In fact, I was involved in a bit of a controversy there over whether or not our hospital alined itself with the medical school to become in effect, a teaching hospital. There was a major dispute with the doctors in the hospital as to whether or not they would accept paid chiefs and they resisted and we wound up with a court case. It was relatively unpleasant. I give you that by way of background.

I respect the medical profession and its objectives. I am concerned, however, that medical costs and health care costs seem remarkably resistant to deflationary pressures. Last summer it was reported that health care spending rose by 15 percent and, of course, health care expenditures are an enormous part of our GNP—10 percent, in fact; about double what it was in 1965.

There is something wrong with medical and health care prices. Why are they resistant to the general deflationary trend across our society? It seems to me that there are forces—I do not suggest conspiracy—but there is an ability to contain the marketplace such that fees are pretty much set arbitrarily.

They seem to be ever higher. There seems to be an inability to get these prices at acceptable levels.

How do you react to that, Dr. Boyle?

Dr. **Boyle**. Senator, the concerns of the American Medical Association with the escalation in health care costs in this country go back a fair number of years. In 1977, we had a report from the National Commission on the Cost of Medical Care, which was sponsored by our association. It produced 48 separate recommendations, all but 1 of which have become the policy of the American Medical Association and have guided us in our testimony before the Congress on a number of occasions.

As far as physicians' fees are concerned, while last year they exceeded the increase in the CPI, in prior years, they had lagged behind in almost every quarter.

Physicians' incomes during the past 10 years have gone down in terms of real dollars, so that they now are realizing somewhere on the order of 5 or 10 percent less real income than they did 10 years ago.

The physicians' fees account for approximately 18 percent of the cost of medical care. The principal costs are in the hospital care and in long-term institutional care.

We have encouraged our members to participate in local coalitions together with business, industry, and others in an effort to try and control these costs. The FTC does impact in some of these areas in that insurance carriers, for example, have declined to participate for fear of violating antitrust laws.

In addition, many local societies have declined to participate because they believe they might be in violation of antitrust or subject to some Federal Trade Commission activity.

Senator LAUTENBERG. I do not want to be the judge as to whether that would suggest a conspiracy, but the fact of the matter is, any cost containment efforts I have seen seem to be more on the hospital side, especially in New Jersey, which has a very good program, perhaps you know, for cost containment in our hospitals.

Mr. Angoff, do you agree with Dr. Boyle's assessment of where physicians' fees are? Do you agree that there is a general decline in the cost for health care or at least there is a closer relation today between health care costs and other cost indices?

Mr. ANGOFF. It all depends on your perspective. According to the September 13, 1982 Medical Economics, which is a journal that covers the business and commerical practices of medicine, says that the average doctor in 1981 made more than $86,000 and two out of five doctors made more than $100,000 a year. There is nothing wrong with that, but our position is that these people, no more or no less than anybody else, ought to be subject to the laws that promote competition and attempt to keep prices down.

In some years—well, in 1981, their fees went up 11.7 percent. That is significantly more than the Consumer Price Index that year. In 1982, they were very close together.

The point is, medical fees have continued to increase and something has got to be done about it.

Senator LAUTENBERG. My time is up. Thank you, Mr. Chairman.

The CHAIRMAN. Mr. Kaschub, let me ask you a question, because you did not get to testify. I am not totally familiar with your association, but I would assume that you and Mr. Goldbeck represent most of the major corporations in America that are large purchasers of health care through payment of employee health insurance premiums. Is that right?

Mr. KASCHUB. That is true.

The CHAIRMAN. And your very clear interest is a very genuine competitive interest. You do not want to demean quality of care, but you would like to keep your costs as low as possible?

Mr. KASCHUB. That is correct.

The CHAIRMAN. Now, in your experience, can you cite me any situations where actions of the FTC have been helpful to your companies, to your employees, therefore, in keeping costs down?

Mr. KASCHUB. I do not have any specifically. With respect to GTE, I am aware of some that have occurred that have benefited private insurers and those, I think, Mr. Goldbeck has alluded to.

Mr. GOLDBECK. Yes; there are indeed specific examples, one of which is the rather recent Michigan medical case. That revolved around the cost containment efforts of several of our member corporations in the auto and related industries, with the UAW and the Blues in Michigan. The FTC's original complaint was upheld by the administrative law judge and expanded upon to such an extent that the FTC had to modify it and was praised by the AMA for doing so. Certainly, the FTC's action redounded to the benefit of our member companies and to their employees from an economic standpoint, and we also believe from the standpoint of quality of care.

Another example would be in the case of both the Indiana and Texas dental cases. When we testified before the House just a few days ago, one of the witnesses who joined me at that time was from

ARMCO Steel. ARMCO was directly involved in one of the instances in Texas where they were trying to get the Texas Dental Society to provide them with X-rays so that they could monitor the quality of care and the appropriateness of the payments being charged.

They were not, I hasten to note, requesting any additional administrative X-rays. Therefore, concerns that there might be some additional radiological exposure were not founded in this case. The Texas Dental Society, in that instance, refused, for over 2 years, to provide them with any X-rays that might be at all beneficial in that kind of that analysis. Despite the fact, obviously, that they were paying for the care that those members of the Texas Dental Society were living on.

So, had the *Texas Dental* case or the *Indiana Dental* case been decided in advance of those circumstances, that 2-year timeframe would not have expired. Now, of course, those X-rays will be provided on a regular basis. Those are just two quick examples of the kinds of instances that we feel are beneficial.

The CHAIRMAN. Dr. Boyle, let me ask you a few more questions.

Earlier I mentioned that the physicians who practiced for the Kaiser Health Service were not admitted to the volunteer medical associations in Oregon for a long period of time. Is that commonly true around the country, to the best of your knowledge?

Dr. BOYLE. It may have been in some areas, Mr. Chairman. However, in Los Angeles County which is the second- or third-largest concentration of Kaiser in the country—I think the largest may be in the San Francisco/Oakland Bay area—physicians at Kaiser have been members of the Los Angeles County Medical Association ever since I have been a member of that medical association which begins in 1954.

The CHAIRMAN. That may be because they were so large they decided to take you in, rather than the other way around.

Dr. BOYLE. No; as a matter of fact, there are about 800 members out of about 14,000, so I do not think that is the case.

The CHAIRMAN. I said that only in jest.

I am a lawyer. Your profession and mine are older than some of the professions that States now license and call professions. The bill that we initially sent out of committee last year, exempted from the jurisdiction of the Federal Trade Commission landscape gardeners, beauticians, and barbers. Their histories, as professions, do not go back as far as ours.

Why are we, you and me and our professions, so reluctant to change and so likely to be hidebound by tradition that we think if anyone from the outside wants to suggest something, they are trying to interfere with the quality of our delivery of service?

Dr. BOYLE. I suppose, first of all, there is a resistance on the part of anybody to change. But I think if you will examine our record—the American Medical Association—there has been a progression of change over, particularly, the last 10 years, as society has changed.

The CHAIRMAN. Let me give you an example.

When I was in the Oregon Legislature, the professions resisted tooth and nail the appointment of one or two laymembers to their governing bodies. We had found sufficient abuses, we thought, in the legislature that there should be some outside—not a majority, not even a relatively significant minority—but there should be some outside input. All of the professional associations fought the idea, saying that it was going to injure the public.

Well, we passed the law. They have been on the books for years, now. Indeed, the public has not been injured.

But why do we have that attitude?

Dr. BOYLE. I think that people do tend to resist change when it is first presented to them. The California Medical Asociation not only supported, but sponsored legislation which added up to one less than a majority of our State board of medical quality assurance.

The CHAIRMAN. When was this?

Dr. BOYLE. 1975.

The CHAIRMAN. The State board of quality what?

Dr. BOYLE. Board of medical quality assurance. It is the regulatory board for medicine in California.

The CHAIRMAN. Let me pursue it a little bit further. Why did both of our professions fight allowing advertising so hard? Indeed, we both did.

Dr. BOYLE. First of all, as we know, the policy has been that advertising certainly is permissible.

The CHAIRMAN. I know it is now. I am talking about when people first wanted to do it.

As a lawyer, I have come upon, "No fault divorce; I will do it for $75. A simple will, we will do it for $25." That was subject to censure and disbarment proceedings in the Oregon Bar as unethical conduct.

I am not talking about what your recent position is. I am talking about years ago. That kind of ad was subject to censure by medical associations.

Dr. BOYLE. Yes, sir.

First of all, I think there has been substantial change in society as a whole. Second, the majority of the physicians that I know still resist blatant self-aggrandisement and self-advertisements by some physicians. We consider them to be charlatans.

I think the majority of my colleagues will still consider them charlatans, regardless of what the AMA says.

The CHAIRMAN. Are you a charlatan if you advertise that you speak Spanish?

Dr. BOYLE. No.

The CHAIRMAN. Why the objection to that at the time it came up?

Dr. BOYLE. I was not there. I cannot answer that for you.

The CHAIRMAN. Senator Rudman?

Senator RUDMAN. I only have one question, Mr. Chairman.

Dr. Boyle, I just want to come back to your last answer. You were talking about the quality of care issues, but you were interested in and, if I understand your point about usage for the performance of certain kinds of procedures, under your example, a fully licensed, thereby presumably fully qualified OBGYN practitioner could want to deliver a child in hospital A, which is fully accredited, and you were saying that you might like to make the decision collectively that that hospital does not deliver enough children. Therefore, he would be essentially barred, although he is fully licensed, fully qualified, and the hospital is fully accredited but, based on some standards with which I will not quarrel, you will say that hospital can no longer be a place where he delivers children. Is that correct?

Dr. **Boyle.** No. We would not say that they could not. We would say that he should not. That certainly could work to the competitive disadvantage of that hospital, because there is very hard data that shows that the maternal and child mortality, infant mortality in those hospitals is substantially greater than in hospitals that are providing a sufficient number of deliveries each year. The reason for this is that the personnel and the hospital are not adequately in practice every day to be able to take appropriate care of both mother and infant and, in addition to that, the equipment that they have may not be adequate.

Senator **Rudman.** It seems to me, Dr. Boyle, you may have a valid point, but that should be dealt with, it seems to me, by the way in which we accredit hospitals. Maybe they ought to be accredited for A, B, C and D and not for E, F and G.

But what you are suggesting, it seems to me, could be misused enormously and would create anticompetitive conditions under the guise of quality of care. So I say to you, if that is your concern, then let us make a proposal to accredit hospitals differently. Maybe some of them should not do certain things, but once you say we would like to make that decision generically within the profession, you are creating a scenario for anticompetitive practices that would be legendary, and I would oppose that completely.

Senator Lautenberg?

Senator **Lautenberg.** Dr. Boyle, just so that I get a little better picture of how things are organized in the medical field now, what is the percentage of physicians who are members of the AMA today relative to the total physician population? Is it higher or lower? What percentage is that?

Dr. **Boyle.** Higher or lower than when, sir?

Senator **Lautenberg.** Than at its peak.

Dr. **Boyle.** It has. We are at the highest percentage of membership we have had in, say, the last 20 years. We had a steady increase in membership over the last several years of physicians who are engaged in patient care.

Senator **Lautenberg.** Is there something which you said that I missed? You talked about the percentage. It is exactly the same as its peak level?

Dr. **Boyle.** Yes, sir. We had a distinct drop in membership going back about 10 years ago, and that related to some State medical associations discontinuing the practice of requiring unified membership. When they were allowed separate memberships, we had a substantial drop.

Two large States did that, New York and California. Since that time, we have had a steady increase in membership and our figures last year show that we now have about 250,000-plus members.

Senator **Lautenberg.** And that is what percentage of practicing doctors?

Dr. **Boyle.** There are about 400,000 physicians in the United States. Of those 250,000, approximately 26,000 of them are medical students. So we have a very substantial percentage.

Senator LAUTENBERG. Are the others organized in any way in another competing group or in another major group?

Dr. BOYLE. No, sir. In many instances, physicians choose to belong to a specialty society as opposed to belonging to a State, county, and national medical association.

But there are approximately one-third, I believe, of the physicians out there who do not belong to anything.

Senator LAUTENBERG. Is that because, in any way, they would like to be able to compete more freely, that they do not want to be bound by the rules, written or otherwise, that exist in the AMA?

Dr. BOYLE. In some instances there are physicians who do not really seem to care. Second, there are physicians who simply do not want to pay the dues. It costs a fair amount of money to belong.

Senator LAUTENBERG. Are you satisfied, or do you believe that nurses now enjoy sufficient access to patients? Do the present schemes in our States and in our hospitals, largely affected by doctors, I understand, provide sufficient opportunities for nurses to provide the care that they are trained and licensed to provide, care that is often less costly than the care provided by physicians?

Do you think that they do enjoy sufficient access to patients?

Dr. BOYLE. The practices that are permissible by nurses vary a great deal from State to State. In California, for example, there are several programs in which nurses have limited prescribing authority. They certainly have substantial authority to perform services in hospitals, particularly in areas of critical care and some other things.

Nurses are certified to practice as nurse midwives, as nurse practitioners, but that varies all over the country as to what they are able to do.

Senator LAUTENBERG. Do the midwives for instance have fairly broad access to markets? What do you think?

Dr. BOYLE. Again, that varies a great deal by different States, Senator. I know that in some States they are permitted to admit patients to hospitals, under supervision; in other States they may not be. So I do not think I can give you a generic answer.

Senator LAUTENBERG. Why are some States different from others? Is the medical society involved—I am sure it is—in trying to help develop the policy on that, that would, I assume, either broaden or limit the access?

Dr. BOYLE. I am sure State medical associations do become involved in that process, yes, sir.

Senator LAUTENBERG. If there is limited access by appropriately qualified people, does that tend to raise the cost for medical care for those people who would subscribe to the services by those professionals?

Dr. BOYLE. I do not think that that is particularly what affects the cost of care. The people who seek out the services of nurse midwives, or even lay midwives, are really seeking to have care provided in a different setting other than that which is the traditional place where physicians would choose to have deliveries performed.

Senator LAUTENBERG. Thank you.

The CHAIRMAN. Mr. Lunch, as I understand the position of the National Society of Professional Engineers, you would like to reverse or overturn the Society of Professional Engineers decision? Is that correct?

Mr. LUNCH. No, sir. Before I respond to that, Mr. Chairman, may I correct the record?

The CHAIRMAN. Yes.

Mr. LUNCH. Mr. Angoff stated specifically that last year we proposed an exemption, and that is incorrect. The record is very clear that we have, at no time, proposed that professions be exempt from the antitrust laws or the Federal Trade Commission Act. We took the same position last year that we are taking this year that there should be several critical points written into the law regarding a balancing test or a weighing of the social values against the alleged anticompetitive impact and the State action that I have alluded to before.

Mr. ANGOFF. Mr. Chairman, if I could interject?

The CHAIRMAN. You are entitled to comment on that, yes.

Mr. ANGOFF. It all depends on how you define exemption. Mr. Lunch is absolutely correct when he says they did not propose to explicitly exempt engineers or any other professionals from the antitrust laws. They do exempt professionals from the two tests under the antitrust laws, the per se test and the rule of reason test. So what you are left with is you still technically have the antitrust laws, it is just that they are no longer the antitrust laws, they are a broad, social policy law, because you consider more than competition. You consider all these broad social policy goals.

Mr. LUNCH. One quick comment, if I may, Mr Chairman, in answer to your question.

The CHAIRMAN. All right. I want you to get back to my question.

Mr. LUNCH. Our legislative proposal which is attached to our testimony merely says that, in dealing with professional standards, the Commission shall give due weight to the benefits of such standards of public health, safety and welfare. I do not understand how anybody can quarrel with the concept that the Commission, or any other regulatory authority, ought to look at both sides of the question.

Now, let me answer your question specifically, Mr. Chairman. The answer is no.

The CHAIRMAN. All right.

Mr. LUNCH. We are not attempting to overrule the Supreme Court's decision in our case. We are saying, very frankly and clearly and candidly, that we think professional standards should not be judged, or thrown out, solely on a per se basis, that the professional standard in question should be permitted to be considered by the courts at all levels in terms of the same principle that is stated in our legislative proposal.

The CHAIRMAN. Basically, you want the FTC and the Department of Justice, I would assume, to weigh things in addition to competition. Am I correct?

Mr. LUNCH. Yes, sir.

The CHAIRMAN. Public welfare benefits of some kind?

Mr. LUNCH. Public welfare, the justification, the rationale of a particular rule should be weighed against its alleged anticompetitive effects. That does not say that the Commission, or the Justice Department, or the courts might not conclude, as has happened, might not properly conclude that the social or public benefit is inadequate to support the alleged anticompetitive rule or practice. We have no quarrel with that.

The CHAIRMAN. It looks to me like you are coming very close to expanding the powers of the Federal Trade Commission if they can look beyond competition to the public welfare benefits.

Mr. LUNCH. If that is an expansion, we support it.

The CHAIRMAN. I do not think you mean that.

If you think we have objections now, wait until the FTC comes forth with an adverse decision, because your actions are adverse to public welfare, or some standard like that. I mean, are you seriously suggesting that?

Mr. LUNCH. We think the Commission should be required to evaluate and weigh the public benefit.

The CHAIRMAN. I understand you think they should. Then the FTC will decide that some action of your does not come up to the standard of adequate public welfare.

Mr. LUNCH. This would be a decision that we would have to evaluate and look at. I think they would do it today. I think the Justice Department does it today. I think State regulatory authorities make those kinds of judgments day by day. I think Congress, if I may, Mr. Chairman, has to make those judgments.

The CHAIRMAN. Congress makes them all the time. All I am saying is, I think you are significantly broadening the discretionary powers of the Federal Trade Commission with that kind of a standard.

Mr. LUNCH. We would rather see that kind of a standard, than a per se standard in which the professional standard in question was never exposed to an opportunity for comment, as to its justification.

The CHAIRMAN. And you would include the standard for all professions, all licensed professions?

Mr. LUNCH. Yes, sir. We are not just talking about engineering. Our proposal deals with all professions as defined.

The CHAIRMAN. Are contractors professionals?

Mr. LUNCH. No, sir. We have great respect for them, but not under this definition. Nor beauty operators or photographers, et cetera.

The CHAIRMAN. Senator Rudman?

Senator Lautenberg?

Senator LAUTENBERG. Nothing more. Thank you.

The CHAIRMAN. Mr. Angoff, I am curious. Do you want to comment on the public welfare benefit concept and that kind of delegation to the FTC?

Mr. ANGOFF. Yes, I would.

They allow under the engineers' proposal and the AMA proposal, the defendant can use social welfare as a defense, but the plaintiff cannot use it on its side.

The CHAIRMAN. The FTC cannot use it?

Mr. ANGOFF. That is right, but they can defend by saying it furthers the social welfare.

I would just like to say, this is exactly the argument that people have made, defendants in antitrust cases have made, for 90 years, and the engineers made it in the 1978 *Professional Engineers* case before the Supreme Court.

The Court there, in a very fine opinion by Justice Stephens, characterized that argument as a frontal assault on the basic policy of the Sherman Act. The engineers argued that there should not be a ban on competitive bidding and they admitted that did restrain competition. But they said that they should be allowed to restrain competition because, if you had competition in engineering, the public safety could suffer.

The CHAIRMAN. Mr. Lunch, do you agree with what he said?

Mr. LUNCH. No, sir. If you agree with the opinion of Mr. Justice Stevens——

The CHAIRMAN. No, not on the opinion of Mr. Justice Stevens. What he is saying is that public welfare benefit is going to be an affirmative defense for the professions, but not one that the FTC is to use in weighing its initial decisions.

Mr. LUNCH. What we said in our case through 6 years of litigation was that the courts should evaluate the defense, the justification, the rationale of the particular rule in question. We were prepared to offer, and did offer, an extensive documented testimony, a justification and basis for that rule.

OK, maybe we were wrong. But we should be entitled to have that kind of defense considered by the courts or the Commission as the case may be, instead of being merely thrown out under the formulation of Mr. Justice Stevens which says all we look at is the rule, procompetitive or anticompetitive. If it is not procompetitive, it is no good; we throw it out.

Now, we think that is going much too far and, to that extent, if one may be critical of the Supreme Court, we are critical of that kind of concept.

The CHAIRMAN. Dr. Boyle, I understand that physicians, by and large, agree with this position. Is that correct?

Dr. BOYLE. Agree with the position that was expressed——

The CHAIRMAN. By Mr. Lunch. You are going to eliminate the per se rule, and you are going to temper rule of reason analysis at least with some of the factors that Mr. Lunch referred to.

Dr. BOYLE. No, sir. We do not believe that either the per se rule, or the rule of reason, should be thrown out. We do believe, however, that the opportunity for the court to apply certain standards should be there.

The CHAIRMAN. But that does throw out the per se rule.

Dr. BOYLE. Not necessarily. They may still, in their view, they may say this is a per se violation regardless of any evidence in front of us.

The CHAIRMAN. Yes, they can say it all right. I understand what you are saying. But, at the moment, when you were talking about the per se rule and competitive bidding, that is the per se rule. They do not say we will take a look at other factors.

Mr. Lunch is saying, they should be able to take a look at other factors. I thought that was the physicians' position, too. Am I wrong?

Dr. BOYLE. I am only saying that the Court would look at the evidence as to whether or not something could be considered to be in the public interest. The Court, at that point, could say well, you have said it is in the public interest, but we, in our opinion, that evidence right now just does not apply.

The **Chairman**. That is a change in the per se rule, because in the engineers' case, they are saying you cannot look at that kind of evidence.

Right, Mr. Lunch?

Mr. **Lunch**. I think Dr. Boyle and I are really saying the same thing but, Mr. Chairman, may I just say, at the risk of great exaggeration, that if you applied the rationale of the Supreme Court decision to professional codes of ethics, a rule in a code of ethics which bans lying and cheating is anticompetitive and is therefore in violation of the antitrust laws, because it is an anticompetitive rule: a practitioner, an engineer, a lawyer, a doctor who is allowed to lie and cheat in order to get work obviously has a competitive advantage.

Now, that may sound like a ridiculous exaggeration. But if you read the words, that is what it says.

The **Chairman**. Mr. Angoff?

Mr. **Angoff**. There are two tests under the antitrust laws. One is the per se test and the per se test is used for practices which are so inherently anticompetitive that the Court just looks at them, and once it characterizes those practices in a certain way and says that it is price fixing, or a boycott, they are unlawful.

There is another category of practices, such as vertical restraints or mergers which are tested by the rule of reason. Under that test, the Court weighs anticompetitive effects of the practice against procompetitive effects of the practice. If it is more anticompetitive than it is procompetitive, that violates the antitrust laws. If it is more procompetitive than anticompetitive, it does not violate the antitrust laws.

What Mr. Lunch is arguing now, and what the engineers argued before the Supreme Court in 1978 is that the Court should go beyond the rule of the per se test and the rule of reason and consider, not just anticompetitive effects versus procompetitive effects, but other effects on health, safety and the general welfare.

Our only point is, that is an argument that has continually been rejected, and the court, in 1978, rejected it because they said that engineering certainly could be dangerous, but other things can be dangerous—planes, cars, heavy equipment; many things that are manufactured in the society can be dangerous, that we have made a judgment in the antitrust laws that competition is good for everything, not just price, but service, quality, durability, everything.

The **Chairman**. I think we are all on the same wavelength now.

Mr. **Lunch**. Could I just add one thing?

The **Chairman**. Yes, sir.

Mr. **Lunch**. We are not for price-fixing. Under a rule of reason, anything that is price-fixing could be thrown out by any court in 5 minutes. Very few of the cases involve pure, clear-cut price-fixing. The *Goldfarb* case did. There are very few others. Most of the cases, and our case is in the gray area where some judge's evaluation need to be made.

So we are not here saying we are supporting price-fixing or boycotts or other nefarious practices under our proposal for a balancing test.

The CHAIRMAN. Mr. Lunch, I will say this, and then I will conclude.

With very few exceptions, in the entire judicial system in this country, let alone the administrative system, most cases are gray area cases. You do not very often have open and shut cases, literally the smoking gun case. Now and then, you may find one, but not very often.

Warren, any others?

Frank?

Dr. BOYLE. Mr. Chairman, may I make one very brief comment?

The CHAIRMAN. Yes.

Dr. BOYLE. The American Medical Association does express considerable appreciation to Senator Rudman for his efforts last year. We appreciated that, and we hope we will have an opportunity to work with you and the committee and see if we cannot reach what appears to be a common goal.

The CHAIRMAN. Mr. Goldbeck?

Mr. GOLDBECK. Yes. I would like to respond to the issue that came up between Senator Rudman and Dr. Boyle concerning the provision of information about standards of quality. It is a terribly important area. The very kinds of examples that were raised by Dr. Boyle are of vital importance. They have to become public information, hospital-specific and, indeed, physician-specific. Where there are 30- and 40-percent differentials in morbidity and mortality statistics, the public has a right to know.

The same statistics are available in cardiac catheterization and open heart surgery, to cite two other examples. We are beginning to get outcomes related data in the United States. This is a great step forward, for which the profession deserves a lot of credit. The problem is that the restrictions on the public availability of that information also come from the profession.

It is precious difficult to find out, as a purchaser or a patient, what the comparative morbodity and mortality rates by procedure are among hospitals. To gain that information, to publicize it, to have it be available, is often challenged on the basis that it is confidential. The other frequent excuse is that the public will not be able to accurately interpret the information.

Indeed, if that information is available, there will be no trouble getting the public to go to the hospitals which have the appropriate volume of surgery if the patients are told that their chances of dying are 30 percent greater when going to another hospital The profession does not need an antitrust excemption to make information public. The public can be protected by the profession if the profession has the win to do so.

The CHAIRMAN. It is substantially similar to getting opthamologists to give their patients a prescription so they might shop around and have people look at it.

Gentlemen, thank you very much. We will put Senator Rudman on now and hope, Warren, that you can finish before we have a vote. I do not know when it is going to be, but I think we are going to be all right.

STATEMENT OF HON. WARREN B. RUDMAN, U.S. SENATOR FROM NEW HAMPSHIRE

Senator RUDMAN. Mr. Chairman, again, let me thank you very much for allowing me to sit with your committee and to appear before you this morning. Let me say that I was discussing with my friend, Senator Gorton, during some of the questioning that maybe I made a mistake. I think it is very stimulating being on this committee. I found it much more stimulating than my usual mornings, discussing how many billions of dollars we have overrun in the latest defense projects.

Maybe next year, I might even join you.

I appreciate the opportunity to testify, Mr. Chairman, on the issues of the extent of Federal Trade Commission jurisdiction over professionals and their nonprofit membership associations. This issue has been one of the more contentious and heavily lobbied issues before Congress over the last 4 years, and the manner in which it is resolved is of great importance to the American public, both as consumers of professional services and, of course, as taxpayers.

Last December, I offered a compromise amendment which, if enacted into law, should resolve the issue. Under the compromise, the FTC would have been prohibited from overriding State laws relating to the education, training, and experience requirements for licensure and the permissible tasks and duties of professionals. These areas relate to the quality of care and are matters in which the States have expertise and have traditionally exercised authority.

It is entirely reasonable to assert that the FTC should not be second-guessing State decisions on these questions.

On the other hand, my amendment would have retained FTC jurisdiction over the business and commercial practices of professionals and their associations, an area where the FTC has expertise and enforcement resources and the States, by and large, do not.

I have yet to hear one persuasive reason why the FTC's authority over the business practices of professionals, many of whose practices are incorporated, should be any different than their authority in the regulation of business practices of private corporations.

This proposal was adopted instead of a complete exemption for professionals by the full Senate by a vote of 59 to 37, to which I will add, parenthetically, I remember took place at about 6 in the morning. I have no doubt that this amendment would have been adopted by the House of Representatives had it been offered in place of the Broyhill/Florio amendment.

In saying this, I am in no way denigrating the efforts of Representatives Broyhill and Florio. Their amendment did, however, contain a provision troublesome to many Members of Congress, a provision deleted from my amendment.

In short, while I believe that a majority of both bodies favor some restriction on the FTC's authority, a majority also opposed the complete exemption. It is interesting to note that the written testimony of none of the other witnesses testifying today has indicated support for the Senate-passed amendment. That fact, that everyone dislikes it, to me, Mr. Chairman, indicates that it is probably the perfect compromise.

Thus I urge the committee to adopt the Senate-passed language with two minor modifications.

First, in the area of antitrust, the FTC's authority should be governed by the State action doctrine. I do not believe it would be reasonable for the FTC to bring action against a professional or their association because it was acting in a manner prescribed by State law.

The CHAIRMAN. Unless you want to make sure that what we are talking about, that is when the State law says to the professional, "You must do the following, and it is law," in that case, we are going to say, "The State wants to do that, right or wrong," and the profession is exempt from that activity.

Senator RUDMAN. Precisely. That is mainly in the area of licensure, or scope of practice. I do believe that should be allowed.

The CHAIRMAN. But it has to be an action by State law.

Senator RUDMAN. That is correct.

The only reason I did not approach the antitrust area this time last year was that we were dealing within the confines of an appropriation bill and I could not devise language on this point without subjecting the entire amendment to a point of order on the grounds of legislating on the appropriations bill.

Second, I urge that the word "laws" in relation to the FTC's preemption authority be changed to "statutes and duly promulgated regulations." This is simply a technical, clarifying change.

In the interests of time, I will not discuss the compromise in great detail and instead request the detailed comments I made during December's debate be added into the record at this point.

The CHAIRMAN. That will be added in full.

[The information follows:]

[From the Congressional Record, Dec. 16, 1982]

Mr. RUDMAN. Mr. President, I yield myself 5 minutes from my time.

Mr. President, I rise in opposition to the amendment by the Senator from Idaho and in support of the compromise amendment which I offered and the Committee on Appropriations agreed to.

Mr. President, the committee amendment would reserve to the States exclusive authority in those areas where they traditionally have exercised jurisdiction—the so-called quality of care issues. Specifically, it would prohibit the Federal Trade Commission from preempting State laws, or parts thereof, which establish "training, education, or experience requirements for professionals or the permissible tasks and duties of professionals." These are areas in which the States have expertise and the FTC does not, and the FTC should not be in the business of questioning duly enacted State laws.

At the same time, the committee amendment would retain the FTC's authority over anticompetitive "commercial practices" or professionals, practices such as price fixing and boycotts. The FTC's authority in these types of actions in unchallenged as regards businesses. No sound reason at all has been advanced for arbitrarily immunizing from FTC scrutiny professionals who engage in such illegal acts.

The compromise proposal, Mr. President, differs from the earlier Broyhill-Florio amendment in that the so-called preemption override, which would have allowed the FTC to preempt any State law if it found that it did or might adversely affect competition, has been eliminated. A number of Senators were concerned that the override provision created a loophole which the FTC would exploit to second-guess appropriate State actions, a fear, I might add, that was not unfounded given some of the FTC's past actions.

In addition, the American Medical Association raised the concern that it would grant the FTX its largest expansion of regulatory authority since the Magnuson-

Moss amendments of 1975 and "would go far beyond existing law." Accordingly, I responded to these concerns and dropped that section of the compromise.

In contrast, the amendment advanced by the Senator from Idaho would totally eliminate FTC jurisdiction over the professions and their professional associations. The FTC would be prohibited from investigating and pursuing even the most clear-cut and egregious violations of antitrust and consumer protection law and would be forced to drop litigation now underway.

To understand what is at stake here, it is instructive to take a look at the cases the FTC has brought against professionals in the past:

1. Illegal threats by a town's only doctors to boycott the local hospital's emergency room if it recruited competing physicians to practice at the hospital.

2. Advertising restrictions used to:

a. Prevent doctors from advertising they accept medicaid or medicare assignment.

b. Prevent doctors from advertising to the Hispanic community that they spoke Spanish.

c. Drive a physician house-call services out of business.

d. Prevent a church organization from running a low/cost cardiac stress clinic.

3. Price-fixing agreements where physicians agreed not to work below "usual" rates, thus preventing hospitals from reducing costs.

4. Boycotts of health maintenance organizations by physician groups by, for example, excluding HMO doctors from hospitals or preventing them from obtaining malpractice insurance.

5. Boycotts of dental cost-containment programs developed by insurance, industry, and labor groups.

6. Illegal kickbacks from a major medical laboratory corporation to physicians.

7. Coercion to compel a State medicaid program to increase doctors' fees.

8. The Eyeglass I rule which permits the advertising of eyeglass prices and requires that prescriptions be released to consumers. This is the only instance in which the FTC has invalidated state laws relating to the professionals and it has led to a substantial reduction in the price of both eyeglasses and contact lenses, including a reduction in the average price of soft lenses from $300 to $100.

As you can see, Mr. President, these actions by the FTC have had nothing to do with the quality of care. The quality of treatment any patient received was not affected in any manner by these FTC Actions. All that changed was the price the consumer had to pay.

All the change was that the price was lower.

The American Medical Association has advanced the proposition that FTC Authority over the professions is duplicative, that the U.S. Department of Justice and the State attorneys general have sufficient authority to take whatever actions are necessary. My response to that argument is direct.

First, the Justice Department has traditionally deferred to the FTC in this area, just as it has in the area of Robinson-Patman violations, and it has not brought a case relating to professionals in many years. It has neither the resources nor the expertise. There can be no greater emphasis of this than the fact that the last six Assistant Attorneys General in charge of the Department's Antitrust Division, including William Baxter, the incombent, have opposed the complete exemption for professionals.

As for the State attorneys general, the AMA has neglected to mention that 13 do not even have the legal authority to bring antitrust actions against professionals and 27 others have never done so, primarily for lack of resources. In my neighboring State of Maine, for example, the FTC is currently conducting a price-fixing investigation involving doctors. Prior to commencing the investigation, the FTC asked the attorney general of Maine if he would prefer to handle the case. He declined.

Yet, Mr. President, the most outrageous aspect to this line of argument that the AMA has advanced, and which shows just how arrogant professionals can sometimes be, is the fact that at the last AMA House of Delegates meeting, in June of this year, a resolution was adopted in support of a health care exemption from both Federal and State antitrust laws. Thus, the AMA has had the unmitigated gall to come before the Congress requesting an exemption from FTC jurisdiction on the grounds the States can handle any existing problems while preparing to seek exemption from State jurisdiction at the same time. That kind of duplicity should not be rewarded.

Mr. President, it is interesting to hear what others have to say on this issue. The Wall Street Journal, not a liberal paper by any means, wrote:

> [G]enerally, more power to the FTC has meant more punitive and unnecessary regulation. But this time the Commission is on the side of the markets. . . . A lot of what is going to be walking around disguised as decentralization or deregulation

just may, when you take a closer look, turn out to be just the same old protectionism underneath.

Other conservative organizations such as the Heritage Foundation, the National Association of Attorneys General, and the Small Business Legislative Council have also criticized total exemption.

The administration opposes the amendment of the Senator from Idaho and supports the compromise as indicated in statements by Vice President Bush, OMB Director Stockman, and HHS Secretary Schweiker. Additionally, all four Commissioners of the FTC support my position.

Supporters also include the American Association of Retired Persons, Consumers Union of America, Congresswatch, the UAW, the United Steelworkers, the Food Marketing Institute, and virtually every health professional organization other than the AMA.

Mr. President, I know we are trying to pass this continuing resolution and I will conclude my remarks. But, one final point must be made. Roughly $300 billion, representing 10 percent of the gross national product, was spent on health care in this country last year. The Federal Government is the Nation's single largest purchaser of health care, having spent about $80 billion in fiscal 1982 alone. Under these circumstances, it is clear that the Federal Government must have the authority and means to combat illegal, anticompetitive practices by health care professionals. The FTC is the only Federal agency with that means and authority to do that. To argue that its authority to scrutinize such activities should be revoked is to abdicate a national responsibility and is nothing short of absurd.

The compromise proposal the Committee on Appropriations adopted is reasonable. It grants the States exclusive authority in those areas where it has been used and where they have expertise while preserving FTC jurisdiction in areas where it has traditionally acted. The amendment by the Senator from Idaho would place a limited class of people above the law and represents the worst type of narrow, special interest legislation. If adopted, it would prove that Adam Smith was probably correct when, 206 years ago, he observed:

"People of same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices."

I urge my colleagues' support of the compromise and their vote against the pending amendment.

Mr. President, you have in front of you a letter from the Vice President of the United States who indicates the support of the administration.

I noticed something very interesting in the last week. For the first time in 20 years doctors are making house calls. They made house calls in the Dirksen Building, they made house calls in the Russell Building. They are so concerned about our health that the reception room is packed with them, and I say we ought to give the American people a break.

As they trudged down the steps discouraged and disheartened because we did the right thing, as they get into their Mercedes and Porsches and drive back to their suites in the Madison, let us give the American people a break. Let us regulate those things which need regulation. Let us regulate anticompetitive practices. I thank the Chair.

Senator RUDMAN. It is important to emphasize that the FTC's activities in the areas of the professions have not been regulatory in nature. Rather, they have been deregulatory.

The FTC has not been telling professionals how to provide their service. Rather, the Commission has acted when an opthmologist refuses to release a prescription to his customer, when doctors conspire and threaten a boycott for the purpose of coercing a State to increase fees under its medicaid program, when dentists withhold information necessary for cost containment, or when professionals conspire to fix prices or accept kickbacks.

None of these actions touch on the quality of service provided by the professional. In no case was the professional's cost of doing business increased. The actions were all obviously illegal, and the FTC action served to protect the consumers.

In short, the FTC's actions relating to professionals have been necessary and beneficial to the consumers.

I would like to address two new "compromise" proposals that have recently surfaced relating to FTC jurisdiction over the professionals. One proposal would require the FTC to apply a so-called rule of reason, just discussed here a couple of minutes ago, to proposed actions.

This is not a rule of reason in the normal sense of antitrust law, as exists for certain vertical arrangements, but rather a new standard where the harm from the competitive restraints would have to be waived against the presumed benefits in terms of quality, safety or effectiveness of care.

Mr. Chairman, from my own experience, which is reasonably extensive, such a standard is formless and would be impossible to litigate. It has no precedent in antitrust law, and there is not one shred of evidence to show that the existing per se and rule of reason tests in antitrust law have caused any consumer injury.

In addition, I find it somewhat ironic that the three organizations which have so consistently argued that the FTC lacks the ability or expertise to judge quality of care issues are now suggesting, it seems to me, that it weigh quality of care issues in every case it proposes to bring.

The second proposal would exempt the actions of professionals or their associations that are "in conformance with" or "permitted by State law." Thirteen States do not have antitrust laws, or have statutes that are inapplicable to professionals. Thus, to start with, such a proposal would be tantamount to getting professionals to engage in the most blatant antitrust violations in those States.

In any case, the FTC is a national agency with a national mission and its ability to take action against unfair or anticompetitive business practices should not be dependent on the vagaries of State law.

Both of these proposals, and especially in combination, are tantamount to a virtual exemption for professionals from FTC jurisdiction, and I would be compelled to resist them to the fullest, Mr. Chairman, on the floor of the Senate.

I would like to make one final comment in relation to health care, the focus of much of the debate and discussion in this area.

Roughly $300 billion, or about 10 percent of the GNP, was spent on health care last year. The Federal Government is the Nation's largest single purchaser of health care, having spent about $80 billion in fiscal year 1982.

Under these circumstances, the Federal Government has a very important stake in combating illegal, anticompetitive practices by health care professionals. The FTC is the only Federal agency with both the resources and the authority to do this.

To argue that the FTC's authority to scrutinize such activities should be abolished without recreating the identical authority in another agency is to abdicate a national responsibility.

In closing, Mr. Chairman, I believe that after 4 years of debate over this subject, Congress finally has a reasonable compromise, one that all parties on both sides of the issue have problems with, but nonetheless, a reasonable compromise. Having come late to this debate and having built upon the work of others, I take no pride of authorship but, as a compromise supported by the administration, I believe a majority in both the Senate and the House, I urge the committee to put this issue finally to rest and to adopt the compromise.

I thank you, Mr. Chairman. If you have any questions, I will be pleased to answer them.

The **Chairman**. I have only one so that everyone will be clear what we mean by State action.

If the doctors can talk the legislature into passing a law that says doctors cannot advertise, the doctor's compliance with that law becomes immune?

Senator **Rudman**. That is correct.

The **Chairman**. Second, I hope everyone was noting your comments, understanding what it means, when you say you will oppose to the fullest extent.

I know Warren well. That is not a comment to be taken lightly.

Frank?

Senator **Lautenberg**. I have no questions.

The **Chairman**. Warren, thank you for joining us, and thank you very much for testifying.

Senator **Rudman**. Mr. Chairman, Senator Lautenberg, it was delightful to appear before you this morning.

The **Chairman**. Thank you.

Now, let us take Dr. Edward P. Maynard, representing the American College of Physicians.

Go right ahead, Doctor.

STATEMENT OF DR. EDWIN P. MAYNARD III, FACP, CHAIRMAN, HEALTH AND PUBLIC POLICY COMMITTEE, AMERICAN COLLEGE OF PHYSICIANS, ACCOMPANIED BY DR. JOHN R. BALL, J.D., ASSOCIATE EXECUTIVE VICE PRESIDENT FOR HEALTH AND PUBLIC POLICY

Dr. **Maynard**. Mr. Chairman, members of the committee, the American College of Physicians is pleased to have this opportunity to appear before you today to outline our views on the reauthorization of the Federal Trade Commission. We have not previously taken a position on this issue.

I am Dr. Edwin Maynard, chairman of the health and public policy committee of the college. I am presently assistant clinical professor of medicine at the Harvard Medical School and a practicing internist at the Masschusetts General Hospital in Boston.

Accompanying me today is Dr. John Ball, executive vice president for health and public policy of the ACP.

The college was founded in 1915 to uphold high standards in medical education, medical practice and medical research. Today, the college represents over 56,000 doctors of internal medicine and allied specialties, including private practitioners providing primary care, medical specialists in such fields as gastroenterology and cardiology, medical educators and researchers.

It is the largest medical specialty society.

The American College of Physicians holds that the FTC has a legitimate role in monitoring the business aspects of health care delivery. The college believes that the Commission has clear responsibility for insuring the fairness of business competition and the protection of the American consumer.

We also believe that the medical profession has a legitimate role, and an ethical responsibility, in insuring the quality of patient care and the quality of medical education and training. We believe that our profession's leadership role in quality assurance and accreditation should be recognized by the Federal Trade Commission, by the Congress, and by Government at all levels.

Lastly, the college believes that the administrative practices of the Federal Trade Commission must adhere to basic principles of fairness and due process and all necessary actions must be taken to insure conformance to these principles. The importance of this standard should not be underestimated.

The ACP recognizes that the courts have held that the professions are subject to antitrust law and to the Federal Trade Commission Act. The question, therefore, is whether the present system should be changed to restrict or alter the FTC's authority over the professions. It is our belief that major legislative changes are not warranted, and need not be sought by the medical profession.

To clarify this position, it may be useful to conceptualize the full range of health care activities as a continuous spectrum with the purely commercial at one end and the clearly professional at the other. The professional practice of physicians is based on an arduous training that involves college, medical school, internship and residency and continuing medical education. Each step is provided by publicly chartered institutions that have defined academic goals and are subject to strict accreditation mechanisms.

Medical schools are accredited by one mechanism, residency programs by a separate one. Physicians with advanced training are certified as specialists by the specialty boards. Similarly, there is a voluntary system for assuring quality in hospitals and Congress has recognized the Joint Commission on Accreditation of Hospitals for the purpose of medicare and medicaid participation.

All of these credentialing processes have been dedicated to the attainment of the highest quality of patient care. We believe these processes are inherently professional and that they should not be subject to unwarranted or capricious review by the Federal Trade Commission.

At the other end of the spectrum, modern health care delivery involves a bewildering array of products and services that are made and sold competitively. Examples might range from a large, for-profit hospital corporation to the manufacturing of suture material.

While these elements are crucial to the provision of high quality care, they are clearly commerce. The FTC has not only the right, but the obligation, to insure that the provision of these elements of care is free of anti-competitive restraints. This role is all the more important in an era of progressively worrisome cost increases.

The challenge lies in trying to define the boundary between the academic and professional elements at one end and the commercial processes of the other. As one example, when is a public announcement of services and probable benefits a respect for the public's right to know, and when is it deceptive advertising? Difficult as such distinctions may have been in the past, the current growth of the for-profit sector of health care will compound them greatly.

These complexities have already led to mutual misunderstanding: The FTC is sometimes seen as interpreting genuine self-regulation as self-protection, and the profession has sometimes condemned FTC scrutiny as an unwarranted invasion of professional responsibility.

I would like to summarize the position of the American College of Physicians as follows. (1) The hallmark of any profession is the right to set and enforce appropriate standards of behavior. This right can only be maintained if it is subject to valid public scrutiny. Since the grant of the right is an expression of the public will and the assumption of the right implies accountability. (2) We believe there must be a better understanding with respect to the responsibilities of the profession and the FTC. While not seeking any exemption, we recommend that your committee recognize and underscore, perhaps in its report language, the primary role of the profession in such activities as accreditation, certification and quality assurance. We urge that any regulatory activity by the FTC in these areas be undertaken only if it is clearly justified by specific indications.

(3) Third, such an underscoring of existing law and clarification of the relative roles of the FTC and the profession would ease the fears of many that the profession's ability to carry out its responsibilities is in jeopardy under antitrust law. We are hopeful that if this essential spirit of the law can be captured, it will prove unnecessary to craft complex definitions and assignments of responsibilities which, by their nature, must run the risk of being either overly broad or excessively narrow.

The American College of Physicians is ready to work with the committee in attempting to resolve these issues. We are grateful for the opportunity to testify and would be pleased to respond to any questions that you, or any other members of the committee, might have. I thank you.

The CHAIRMAN. Doctor, thank you very much.

I want to make sure this area of certification and quality assurance, you are not actually recommending any language for the bill. You would like to see some report language, and you hope the FTC proceeds cautiously, but you are not asking for any change of language?

Dr. MAYNARD. That is correct.

The CHAIRMAN. In your experience, do you think the FTC has evidenced any irresponsibility or overzealousness in their attempting to monitor the activities of the medical profession?

Dr. MAYNARD. I would answer that in a different way. First of all, I believe that the behavior pattern of the FTC has changed in recent years and, in particular, since the redrafting of their authority in 1980.

There appear to have been instances in earlier years when their behavior has been termed that of a rogue agency, and some of their tactics have been considered inappropriate. As we look at some of the recent actions of the FTC, we believe that, in balance, all of these have been appropriate and have been directed toward unwarranted practices by the medical profession.

The CHAIRMAN. Doctor, you give a very accurate and cautious answer. I emphasize accurate.

I have seen this in all bureaucracies, when they are new or when they are given some new powers. When we first created OSHA, the Occupational Safety and Health Administration, we had more complaints from business about zealous 25-year-old inspectors coming out and explaining to them that they had to put the ladder on the other side of the plant, or something. Clearly there was arrogance, often beyond justification.

For 3 or 4 years, it caused us great problems with the organization. Today, that has relatively settled down.

When the EPA was first founded, and the law was new and we had a lot, again, of younger people involved, we had difficulties with their manner of presentation. Today, we still have philosophical arguments about what should be the function of the EPA, but they are generally philosophical. They are substantive arguments, but the day of the allegation of arrogance is gone.

I think there was a time in some areas, and especially when we get into the rulemaking power which was only added in the mid-1970's, that there was some overzealousness by the Federal Trade Commission. That, I think, rankled more than the substance of what people were talking about.

I have no other questions. I appreciate doubly your coming, not just because of your time, but because of the prestige of the organization that you represent. It means a great deal to us.

Frank?

Senator LAUTENBERG. Yes.

Dr. Maynard, it was an excellent presentation. You passed by a lot of material in your summary. It is very interesting reading.

I paid particular attention to the statement that you made which said that in exempting the physicians from antitrust action, we would establish a privileged class. I might have paraphrased that.

Dr. MAYNARD. That is correct. We do not see ourselves as being a profession that should be exempt.

Senator LAUTENBERG. So the only areas that you are concerned about deal with the certification, accreditation and educational aspects. You would like to preserve that for independent rule or review by the profession?

Dr. MAYNARD. We believe that it is appropriate for the Federal Trade Commission to have an oversight capacity, to look at how these credentialing, and accrediting mechanisms are used and that, if indeed they are truly in the public interest, truly performed in a professional manner, this should be left to the profession.

However, as has been previously pointed out, on occasion some of these accrediting mechanisms, the credentialing activities can be distorted and brought to use in a truly anticompetitive manner.

Senator LAUTENBERG. Do you think the profession has essentially a free, competitive environment right now?

Dr. MAYNARD. I think that is a very difficult question to answer. Generically, I think there are areas in which competition can be enhanced. We talk about different areas of the country and competition varies widely, depending upon the numbers of physicians there, the numbers of allied health professionals that are there.

There is no question that if you are a physician practicing in an isolated section of the country, you may be subject to no competition whatsoever, because you are the only individual there.

If you are in a large, urban area where they are overly doctored, then competition is a major factor in life.

Senator LAUTENBERG. It is funny. There is a bit of a paradox there, because usually in those areas where there is only one doctor the doctor does not have a booming medical practice in terms of financial opportunity. In those areas where there is an abundance, that seems to produce the largest incomes among physicians.

I do not object to the incomes. My concern is that the public is being treated fairly and that the competition is free, but no profession, in my view, should be exempt from antitrust enforcement.

I think, without suggesting ways of competition, I think if there is a sufficient body of physicians out there to render health care, I think we will see costs coming down.

I wonder, in terms of the view you present, and the view of your colleague, Dr. Boyle, representing the American Medical Association, whether you see any contrast. Do you think that the AMA is more concerned about this matter than the college?

Dr. MAYNARD. I think, quite clearly, our position is different from that of the AMA. I would emphasize that a lot of this has to do with the perception of what the FTC has done in the past and might do in the future, vis-a-vis the activities of the professions. This aspect of perception as opposed to reality is a very important factor.

Senator LAUTENBERG. Thank you very much, Dr. Maynard.

Thank you, Mr. Chairman.

The CHAIRMAN. Doctor, thank you very much. I have no further questions.

Dr. MAYNARD. Thank you.

[The statement follows:]

STATEMENT OF DR. EDWIN P. MAYNARD III, AMERICAN COLLEGE OF PHYSICIANS

Mr. Chairman and Members of the committee; the American College of Physicians (ACP) is pleased to have this opportunity to appear before you today to outline our views on the reauthorization of the Federal Trade Commission (FTC). My name is Edwin P. Maynard, III, MD, FACP, and I am Chairman of the Health and Public Policy Committee of the American College of Physicians. I am presently Assistant Clinical Professor of Medicine at the Harvard Medical School and a practicing internist at the Massachusetts General Hospital in Boston. Accompanying me today is John R. Ball, MD, JD, the Associate Executive Vice President for Health and Public Policy of the ACP.

The College was founded in 1915 to uphold high standards in medical education, medical practice, and medical research. Today the College represents over 56,000 doctors of internal medicine, related non-surgical specialists, and physicians-in-training. Approximately one third of our members are Fellows of the College (FACP), a designation based upon their having met the standards of a national credentials committee in the areas of scholarship and contribution to the science and practice of internal medicine. The ACP membership includes private practictioners providing primary health care; medical specialists in such fields as gastroenterology, endocrinology, oncology, and cardiology; medical educators and researchers. It is the largest organization of general internists and allied subspecialists in the world.

The statement that we present today outlines the College's views on the relationship between the Federal Trade Commission and the medical profession and reflects months of careful review and disussion by the policy-making bodies of the College, culminating in its approval by the Board of Regents late last year.

In its essence, this position holds that the FTC has a legitimate role in monitoring the business aspects of health care delivery. The College believes that the Commission has clear responsibility for ensuring the protection of business competition and the protection of the American consumer, and it appropriately should act to prevent unfair methods of competition and unfair or deceptive practices affecting commerce. We believe that to prevent FTC scrutiny of those aspects of health care delivery which are directly linked to the business of health care would be inappropriate. Additionally, we believe that exempting the medical profession from all FTC review would create a special privileged class and is therefore inequitable.

We also believe that the medical profession has a legitimate role and an ethical responsbility in ensuring the quality of patient care and the quality of medical education and training. Such activities include the necessary credentialing by the profession of individuals and insitutions through a variety of testing and accreditation processes. Continued recognition and preservation of the medical profession's leadership role in quality assurance, education, and accreditation activities is required not only of the Federal Trade Commission, but also of the Congress and of government at all levels. A key component of such recognition includes understanding and acknowledging the legitimate and proper role of voluntary associations in quality assurance, education, and accreditation.

Lastly, the College believes that the administrative processes of the Federal Trade Commission must adhere to basic principles of fairness and due process, and all necessary actions must be taken to ensure conformance to these principles.

We are here today because we believe that a full discussion of these issues is critical and that the debate must be begun in a manner of honest and forthright discussion of the respective responsibilities of the Federal Trade Commission and of the medical profession. It is our belief that if the profession fails to enter into this discussion in a productive fashion and fails to inform the Congress and the FTC as to our own perception of these respective roles, that the right and responsibility for self-regulation in the areas of credentialing, accreditation, and quality assurance will be placed in jeopardy.

JURISDICTION OF THE FEDERAL TRADE COMMISSION

It is the position of the American College of Physicians that the courts have clearly held that the professions are subject to antitrust law. It is our further view that the courts have also upheld the applicability of the Federal Trade Commission Act to the professions. This committee is well aware of the case law on these points and we will not attempt to recapitulate the pertinent cases.

We realize that this question of jurisdiction has engendered substantial debate not only within the Congress but also within the medical profession and within other professions as well. However, we believe that further debate on this point is unwarranted, and that the findings of the courts speak for themselves. As noted earlier we have no quarrel with the concept that the Federal Trade Commission has responsibility for ensuring the protection of competition and for preventing unfair methods of competition and unfair or deceptive practices affecting commerce, and that their purview should include the health care delivery system.

However, there is a valid point for discussion: that is, whether changes should be made in this present system to restrict or alter the FTC's authority over the professions. It is our belief that such changes are not warranted nor should they be sought by members of the profession of medicine. The College believes that the spectrum of the provision of health care has become both very broad and most complex. Modern health care provision is a combination of services of professionals—such as physicians and nurses—and products that are not inherently professional—such as material, equipment, and machinery. Terms of commerce—cost containment, competition, prospective payment—that were not even in our lexicon a decade ago are now commonly applied to health care. Therefore, health care itself is no longer solely the province of the individual practitioner but has become, in a more general sense, a significant component of our national economic life.

This committee is well aware of the litany of statistics that encapsulate the growth of the health care industry—as a nation we presently spend over $300 billion for health care, a sum comprising approximately ten percent of our Gross National Product (GNP)—and there is general agreement on the critical need to ensure that these expenditures are made prudently. Consequently, it is neither realistic nor appropriate for such a significant sector of the economy to be placed outside of the purview of laws governing methods of competition and unfair or deceptive practices affecting commerce. It is quite clear that health care, taken as a whole, is in fact a part of our national system of "commerce"—in the traditional and broad sense of that term.

It may be useful to conceptualize the full range of health care activities as a spectrum—with the clearly commercial at one end and the clearly professional at the other. The professional practice of physicians is based on an arduous training that involves college and medical school, internship, residency and sometimes fellowship, and continuing medical education. Each step is provided by publicly chartered institutions that have defined academic goals and are subject to scrupulous accreditation mechanisms. The processes of credentialing of all sorts—including licensure and specialty board certification—have been painstakingly developed and honed. These are processes which we believe to be inherently professional and which should not be subject to unwarranted review by the Federal Trade Commission or others.

At the other end of the spectrum, health care delivery involves a bewildering array of products and services that are made and sold competitively, often for a not inconsiderable profit. While these elements are crucial to the provision of modern medical care, they are clearly prepared and trafficked in a commercial setting. The FTC has not only the right but also an obligation to ensure that the provision of these elements of care is free of anti-competitive restraints. This role is all the more important in an era of progressively worrisome cost increases.

The challenge arises in trying to define the boundary between the academic and professional elements at one end and the commercial processes at the other. For example, when is the criticism of alternative healers a genuine assertion of a difference in training and therapeutic potential and when is it a selfish attempt to restrain competition? When is the skepticism toward a new grouping of physicians an honest concern that their cost containment has jeopardized patient welfare and when is it an effort to protect a current pattern of fees and charges? When is an announcement of services and probable benefits a respect for the public's right to know and when is it deceptive advertising? Difficult as such distinctions may have been in the past, the current growth of the for-profit sector of health care will compound them greatly. Any determination of the appropriateness of such activities must be based, at the least, upon a full understanding of the need for and value of the profession's assumption of certain self-regulatory responsibilities.

RESPONSIBILITY OF THE MEDICAL PROFESSION

The medical profession—as a profession—engages in a wide variety of activities for the public good. Indeed, just as it is the individual responsibility of the physician to act for the benefit of the patient, it is the corporate responsibility of the profession to act for the benefit of the public. Parenthetically, I would be quick to emphasize that what I wish to focus on here is not a demand for the profession's right to maintain certain activities, but on its responsibility to carry them out for public benefit.

The full range of professional activities includes certain credentialing and accreditation activities carried out at the national level and quality assurance and other activities carried out by individual physicians working within local hospitals and with their local medical societies. Of the host of such valid professional activities, the American College of Physicians wishes to emphasize three: board certification, hospital accreditation, and medical education. Each is carried on for the purpose of ensuring the competence of individuals in medicine or of the quality of institutions within which medical care is provided. Each is also carried on for the purpose of assuring the public that physicians and hospitals meet essential standards, that people have information that will enable them to make responsible choices of a physician and of a hospital. Assuring the public of essential competence and providing valid public information and professional activities of basic value to society.

Certification. "Credentialing" is a generic term relating to a set of different activities by which society grants certain individuals the right to provide health care or certifies their qualifications as meeting specified standards. The most basic credential is a license to practice, granted by the state on the basis of an individual's having met standards determined by the state to be appropriate and to be those minimally acceptable. A license confers the right to practice; the unlicensed practice of medicine is a criminal offense in every state.

In contrast to the license, which is the state-granted entry into what has been termed the "health care market," most other credentialing mechanisms are carried on by the profession, or the private sector. The most important—and most common—professional credentialing mechanism is board certification. The purpose of board certification is to encourage excellence—to encourage the young physician to pursue knowledge and educational experience beyond that minimum required for licensure. Further, the purpose of certification is publically to recognize the attainment of that knowledge and experience and to assure the public that higher, professionally recognized, standards have been met. Thus, board certification can and does serve valid public purposes.

Certification by boards in the medical specialties was initiated as a voluntary credentialing mechansim. The first examining board was established in 1916; it had two basic activities: examining candidates for cognitive and practical competence, and developing requirements for graduate medical education for candidates desiring admission to the examination. Most subsequent boards followed this model, to a greater or lesser degree. Professional societies have been in the forefront of the development of specialty boards in order to ensure the competence of the individuals claiming special expertise. The American College of Physicians, for example, was instrumental in the formation, in 1936, of the American Board of Internal Medicine. In 1933, the four boards then in existence (opthalmology, otolaryngology, obstetrics and gynecology, and dermatology and syphilology) formed the Advisory Board for Medical Specialties, including as associate members the American Hospital Association, the Federation of State Medical Boards, the Association of American Medical Colleges, and the National Board of Medical Examiners. Today there are 23 recognized specialty boards, comprising the membership of the (now named) American Board of Medical Specialties (ABMS), which also consists of Associate Members—non-physician organizations concerned with graduate medical education and specialty practice.

Board certification plays an increasingly vital role as health care has grown more complex. Although the physician's competence has always been of critical importance to the patient, other institutions—including hospitals and federal agencies—increasingly have begun to need both valid measures of competence and the assurance that specific physicians meet appropriate standards. Hospitals, for example, have in the last decade or so been held by the courts to be responsible for the quality of care provided within them. The yardstick of licensure is inadequate to the task the hospital faces in its determination of what privileges to grant individual physicians. For example, in most states the license to practice medicine, once granted, provides no limitations on a physician's practice. Hospitals have a valid concern, for example, that surgeons are qualified to perform surgery, a fact that medical licensure alone does not address. Board certification, while clearly not the only measure a hospital may use, provides some assurance that the physician being considered has achieved a specified level of cognitive and experiential competence.

Just as board certification is a most appropriate encouragement of excellence and measure of competence, the participation of physicians in developing board examinations and criteria for sitting for those examinations is vital. Only physicians have the technical competence for writing examination questions and for determining what consititutes the appropriate level of competence deserving certification. This is not the vulgar demand for an exclusive right; it is the recognition by the profession of a public responsibility. Who else can perform this valid and increasingly necessary activity? How else can it be done? The medical profession, in the development of specialty boards and in the writing and grading of board examinations, serves to ensure the competence of practitioners, and to inform and assure the public of the standards which the board certified specialist has met.

Accreditation. Just as "certification" may be applied to individuals and their qualifications, accreditation is the process by which institutions are measured. These insititutions may be intangible (e.g., training programs in graduate medical education) or tangible (e.g., hospitals).

As indicated a moment ago, one role performed by many specialty certification boards was the development of requirements for graduate medical education for those candidates who desire to sit for the board examination. In 1940, the American Board of Internal Medicine (ABIM), the American College of Physicians, and the Council on Medical Education of the American Medical Association formed the Conference Committee on Graduate Training in Internal Medicine, delegating to it the responsibility for accrediting residency programs in internal medicine. The Committee became the Residency Review Committee in Internal Medicine in 1953. There are now 23 such residency review committees, all of which are cosponsored by the appropriate specialty board and the AMA Council on Medical Education, and 14 of which have a speciality society as a third sponsor.

Although the residency review committees accredit graduate medical education programs, residency requirements (the "essentials" or standards to be met by the programs) require review and approval by a separate body, the Accreditation Council for Graduate Medical Education (ACGME). The sponsors of the ACGME are the ABMS, the American Hospital Association, the AMA, the Association of American Medical Colleges, and the Council of Medical Specialty Societies. The standards used in the accreditation process relate to the quality of the educational program, the capability of the teaching staff, and the availability of resources necessary for the effective conduct of the program.

A separate example of the accreditation process is that of the Joint Commission on Accreditation of Hospitals (JCAH). The medical profession has a long history of leadership in establishing standards for, and encouraging excellence in, the nation's hospitals. In 1918, the American College of Surgeons (ACS), through its Hospital Standardization Program, instituted the first national, voluntary, program of hospital review. The ACS program, for three and a half decades, was a major force in upgrading hospital facilities, and was the institutional and conceptual ancestor of the JCAH. The JCAH, founded in 1951 by the American College of Surgeons, the American Hospital Association, and the Canadian Medical Association, has for three decades now established the standards by which hospitals are measured.

The JCAH accreditation process is a voluntary one. Yet approximately 80 percent of the nation's acute care hospitals, viewing the JCAH standards as the benchmark, apply for accreditation in each accreditation cycle. JCAH accreditation is measurement, by written response and field survey, of the hospital's facilities and services against predetermined JCAH standards. Those standards, revised six times between 1951 and 1966, have been revised annually since 1970, and are updated more often if new data become available. The standards themselves have evolved over the years: from those that reflected minimal acceptability to those that are optimally achievable; from those that focused on the hospital's physical plant and facilities to those that focus on its services; and from those that were prescriptive to those that allow flexibility.

In addition, the process of standards development has become an open one. For each of the accreditation programs of the JCAH (the hospital program is but one; others are long term care, ambulatory care, and hospice), there is a Professional and Technical Advisory Committee, with representatives from a wide variety of non-physician professional groups, business, and the public, as well as individuals with technical expertise. A Policy Advisory Committee, again comprised of individuals outside the medical and hospital professions, provides policy advice to the JCAH Board of Commissioners. The Board itself has a public member. Each proposed revision of the standards is sent to at least 3,000 interested institutions and individuals for review and comment. The openness of the standards development process is quite likely unique among all accreditation activities in any professional field.

The JCAH standards and the accreditation process are viewed by the American College of Physicians as a responsibility of the medical profession, a responsibility physicians have shouldered and which has had, as its clear outcome, the excellence of this nation's hospitals. Indeed, Congress has recognized both the value of JCAH accreditation and the strength of its standards in providing by statute that any hospital accredited by the JCAH is deemed to have met the Department of Health and Human Services' Conditions of Participation in the Medicare and Medicaid Programs.

The accreditation of institutions, like the certification of individuals, is a demanding process that tests the recipient against rigorous standards. The process itself demands highly technical input and the expenditure of huge amounts of volunteered time. Institutional accreditation, like certification, meets the vital need of the public to be assured that health care institutions meet essential and trustworthy standards of quality.

Medical Education. A final, and briefer, word must be said about medical education. Here, perhaps even more than in the fields of certification and accreditation, has the profession seen and carried out a responsibility to ensure excellence. At three levels—undergraduate medical education (the medical schools), graduate medical education (residency programs), and continuing medical education—the profession and professional societies such as the American College of Physicians and the American Medical Association have been involved in developing educational programs and in separately developing the standards by which programs are measured.

United States medical schools, with their unique combination of teaching, patient care, and research, are the envy of the world. The medical profession, through the Liaison Committee on Medical Education (LCME), cosponsored by the Association of American Medical Colleges and the AMA, accredits undergraduate medical education programs in this country and Canada. All state medical practice laws recognize the accreditation status conferred by the LCME on medical schools, and holders of the M.D. degree awarded by them are eligible to sit for state licensure and examinations. The LCME has avoided dictating curriculum content, but has encouraged institutions to go beyond established minimal standards and approach the education of physicians in a variety of ways. Each medical school, faculty is responsible, for example, for establishing the criteria for evaluating student performance, promotion, and graduation. Thus the LCME accreditation program, far from narrowing the range of educational programs, has enhanced diversity.

In the area of graduate medical education, the activities of the Residency Review Committees and the AMA Council on Medical Education were outlined earlier. What is important conceptually to note in those activities as, indeed, in all those of the profession, is the continual testing of professionals and institutions against continually updated high standards.

Continuing medical education (CME) programs are diverse. Professional societies, individual hospitals, and academic health centers are among the most important groups in the development and presentation of continuing medical education, and the variety of subject matter and media is immense. An Accreditation Council for Continuing Medical Education (ACCME), sponsored by several organizations interested in the quality of CME, accredits individual programs of CME.

The American College of Physicians, approximately every four years, produces the Medical Knowledge Self-Assessment Program, a comprehensive update of new knowledge in internal medicine in syllabus form that also includes a computer-scored examination in general internal medicine. The present version, MKSAP–VI, in its first six months has had over 30,000 physician subscribers.

The point of this selective review of specific activities of the profession in standards-setting and evaluation is to emphasize, however briefly, the depth of commitment of the medical profession to its responsibility to ensure the quality of medical care in this nation. Professional activities in credentialing, accreditation, and medical education are varied and many, allowing diversity at every level while encouraging excellence. The review is selective and relates primarily to the corporate activities of the profession. It should not be forgotten that individual physicians, making individual clinical decisions, participating in local hospital quality assurance activities and utilization review committees, and working in local medical society grievance committees, among many other activities, also participate in the profession's effort to assure the public that the quality of health services is worthy of confidence.

AREAS OF MISUNDERSTANDING

It is clear from the preceding that the profession has a highly developed sense of its own responsibility for self-regulation. However, our experience indicates that these professional activities are not always fully understood nor fully appreciated by either the FTC or by the Congress. Conservely, it is also quite clear that the profession's knowledge of the activities of the FTC are equally as sketchy or subject to misunderstanding. I would like to briefly note some of the ongoing problems caused by this misunderstanding.

Mr. Chairman, it was noted earlier in this statement that the failure of the profession to inform fully both the Congress and the Federal Trade Commission as to the legitimacy of certain clearly professional activities will ultimately joepardize the profession's ability to carry out its responsibilities in those areas of self-regulation. Let me provide an example of what we perceive to be this type of misunderstanding.

On December 1, 1982 during the House of Representatives consideration of legislation regarding the Federal Trade Commission, there was substantial debate on the issue of the so-called professions exemption. In the context of extensive remarks on that subject, a distinguished member of that body made the following comments:

"The American Medical Association, the American Dental Association, and the American Optometric Association are trying to get out from under the FTC."

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"At the same time, the Joint Commission on Accreditation of Hospitals (JCAH), working hand in glove with the AMA, is seeking to eliminate State and Federal supervision of medicare and medicaid in America's hospitals and substitute their own privately owned commission, totally exempt from all public supervision and accountability, as the only source of accreditation for hospitals receiving Federal funds."

As previously noted, the American College of Physicians is one of five corporate sponsors of the JCAH. We can assure you that the JCAH is not working to substitute its own method of accreditation for that of the federal government. For thrity years, the JCAH has provided voluntary accreditation of the nation's hospitals. It is the Social Security Act which permits facilities that are accredited by the JCAH to be "deemed" to have met the federal conditions of participation in Medicare and Medicaid. In fact, it is generally accepted that traditionally the JCAH standards have provided the model for the federal standards and are indeed more stringent than those standards set by the federal government. Institutions that fail to meet JCAH standards may well still meet federal standards and thereby be eligible for payment under Medicare and Medicaid.

The reason for dwelling on this example is not through a desire to set the record straight, but rather to indicate the potential harm which may be done to self-regulation when it is perceived by the public as part and parcel of self-serving activities. It is precisely for this reason that the American College of Physicians believes that the FTC must maintain the potential right to review appropriately even those activities of the profession which we have previously outlined as professional in nature. The type of publicly held misunderstanding evidenced in the quoted material would only be exacerbated by any effort to remove these activities from the purview of the law.

The hallmark of any profession is the right to set and to enforce appropriate standards affecting professional behavior. As pointed out previously, the purpose of such standards is to ensure the highest level of proficiency in training and practice of members of the profession. This right can only be maintained if it is not above valid public scrutiny, since the grant of the right is an expression of the public will.

We are concerned that any absolute exemption of professional activities from FTC scrutiny could cause unanticipated problems. First, we believe an exemption could potentially heighten public misunderstanding and public mistrust of these processes, and ultimately make all efforts at accreditation, credentialing, and other quality assurance activities suspect. Secondly, we believe that an exemption could create a potential sanctuary for those who might misuse self-regulation for improper purposes.

Let me be clear: we do not believe that any profession, including the profession of medicine, is riddled with individuals who are inherently evil or deceptive and that such an abuse of these legitimate activities is a natural corollary to their exemption from the law. However, what we are saying is that in order to ensure that the public's faith in the legitimacy and value of these activities is maintained, we must make it quite clear that these activities are not beyond the reach of the law. We would sincerely hope that unwarranted scrutiny could be avoided, but we do not believe that creating sacrosanct enclaves is the best mechanism for either preserving these responsibilities or enhancing the public trust. We remain concerned that any exemption of these activities may carry with it a far greater liability of engendering public suspicion. In short, just as one of our most basic societal tenets is that no individual is above the law, neither is any group of individuals, be it a profession or an association of professionals.

Mr. Chairman, we have illustrated briefly the type of public misunderstanding and distrust which can develop whenever a profession, including the profession of medicine, is perceived rightly or wrongly as acting in a self-interested manner. However, we all know that the confusion and misunderstanding which has surrounded and colored all discussion of the FTC and the professions has not been limited to the public.

Discussions within the American College of Physicians have clearly revealed that many physicians are unclear as to the role and the activities of the FTC. Indeed, the profession has not been active in clarifying the misunderstandings of its members about the FTC. We believe that many physicians, if the facts were fully presented and discussed, would support actions of the type taken by the FTC. Furthermore, a review of those actions clearly indicates that the FTC is not on a full-scale rampage against legitimate self-regulatory activities, but has taken action in instances which should be of concern to all of us, activities that have inappropriately restricted competition.

SUMMARY AND RECOMMENDATIONS

The American College of Physicians believes that there must be a better understanding and clarification of the respective responsibilities of the profession and of the Federal Trade Commission. We would recommend that the committee consider placing in its report on the reauthorization of the FTC language that would recognize and underscore the primary role of the profession in such activities as certification, accreditation, and medical education, and that would indicate that any activity by the FTC in these areas should be undertaken only if clearly justified by specific indications.

We believe that this underscoring of existing law and clarification of the division of responsibility between the FTC and the profession would go a long way towards easing the fears of many within the profession that the profession's ability to carry out its responsibilities is in jeopardy under antitrust law. We are hopeful that if this essential spirit of the law can be captured, it will prove unnecessary to attempt to craft and place in statute complex definitions and assignments of responsibilities which by their nature must run the risk of being either overly broad or excessively narrow.

Physicians do not always understand or agree with the FTC; neither does the FTC always understand or agree with the profession. However, that does not mean that it is appropriate to walk away from the problem—we do not do that in the practice of medicine, and we must not do that in the practice of public policy. I can assure you that the College stands ready to work with the committee in attempting to resolve this issue.

This concludes my prepared remarks. I would be pleased to respond to any questions that you or the other members of the committee might have. Thank you.

The CHAIRMAN. Let us conclude with our second panel, Dr. Bentley, Dr. Sullins, Mr. Hagman, Ms. Cole, and Mr. Hacking.

For planning purposes, let me tell you what my hoped-for plan is. I am surprised we have not had a vote yet. I hope we can finish your panel before we do, because otherwise, we are faced with a situation of having to reschedule you, or just having you submit your testimony for the record. So we will go as far as we can right now, and see if we can make it without any votes.

Why do you not start out, Dr. Bentley?

STATEMENTS OF DR. DONALD B. BENTLEY, PRESIDENT-ELECT, AMERICAN DENTAL ASSOCIATION, ACCOMPANIED BY HAL M. CHRISTENSEN, DIRECTOR, WASHINGTON OFFICE; DR. W. DAVID SULLINS, JR., CHAIRMAN, FEDERAL RELATIONS ADVISORY COMMITTEE, AMERICAN OPTOMETRIC ASSOCIATION; ROBERT E. HAGMAN, FIRST VICE PRESIDENT, OPTICIANS ASSOCIATION OF AMERICA; EUNICE COLE, PRESIDENT, AMERICAN NURSES' ASSOCIATION; AND JAMES HACKING, ASSISTANT LEGISLATIVE COUNSEL, AMERICAN ASSOCIATION OF RETIRED PERSONS

Dr. BENTLEY. Thank you, Mr. Chairman.

Mr. Chairman, members of the committee, I am Dr. Don Bentley from Hawley, Minn. I am here today as president-elect of the American Dental Association, representing more than 140,000 members.

I am accompanied by Mr. Hal M. Christensen, director of the association's Washington office.

The dental profession appreciates this opportunity to present its views on legislation to reauthorize the Federal Trade Commission.

Mr. Chairman, the American Dental Association has some serious concerns with FTC attempts to impose a questionable authority on the practice of dentistry and other State-regulated professions. Those concerns relate primarily to the Commission's efforts to preempt and supersede State laws and regulations covering such things as licensure, examination and training of dentists, duties that may be performed by auxiliary personnel, supervision of such personnel, accreditation of schools, providing of dental care by nonprofessionals, and virtually every other aspect of State regulation of the practice of dentistry.

We also have concern about the onerous procedural burdens imposed by the FTC when it undertakes the investigation of a profession. Congressional attention to these matters has led to some administrative changes of the Commission which we readily ackowledge, but we do not believe that administrative measures provide the permanent remedy that is required.

Having said that, Mr. Chairman, we sincerely hope the information received at these hearings will be helpful to this committee in moving toward a new consensus on FTC legislation and we assure you that the dentists of America are prepared to support consensus legislation.

As you know, this issue was extensively debated in both the Senate and the House last year, culminating in the adoption of legislation in both Chambers demonstrating that a majority of Congress wanted to limit the FTC's authority to preempt State laws regulating the professions. In the Senate, legislation offered by Senator Rudman was included in the Senate late last year. It replaced an earlier Rudman measure.

The original Rudman proposal, like the Broyhill amendment in the House, purported to limit the Commission's attempts to invalidate State laws, but it actually conferred such authority upon a mere finding by the Commission that the State statute in question involved the business or commercial practice and was "anticompetitive."

We objected to that proposal because it would have allowed the Commission to limit its own authority and to select the State laws it wished to invalidate. The previous presumption of that authority by the Commission is precisely the reason why we are here today.

Senator Rudman's revised amendment clearly stated that the FTC could not preempt State statutes relating to the scope of professional practice. This legislation, which applied to FTC's antitrust and consumer protection activities, was the legislation passed by the Senate.

Although it did not survive in conference, we believe its emergence at the end of the 97th Congress represented a basis for consensus in the 98th Congress. The dental profession trusts that the momentum for a legislative solution will continue, and we would make the following recommendations toward that objective.

First, any proposal on FTC authority should be permanent in nature. I think everyone can agree that there has been enough discussion, legislative maneuvering, moratoriums, and continuing resolutions on this issue. It is time for a consensus statutory change in the Federal Trade Commission Act.

Second, from all the debates and hearings held in the 97th Congress, it is evident that there is general agreement that the FTC authority should be limited with respect to preempting State laws relating to the practice of the professions.

Third, any limitation on FTC preemption authority should be applicable to both the Commission's antitrust authority and consumer protection powers. This provision in the revised Rudman amendment was an important factor in the association's support of that proposal.

Finally, we recommend some clarification of FTC jurisdiction with respect to lawful activities undertaken by nonprofit professional associations such as the ADA. These activities, which can only be effectively undertaken by members of a profession, are essential to a professional association's service in the public interest.

We believe that the activities of the ADA, such as peer review and accreditation of schools, have led to improvements in standards in the quality of dental care and in the Nation's oral health.

Let me emphasize that our proposed distinction regarding legitimate activities would not, in any way, be intended to place dentists, or the members of any profession, beyond or above certain rules and laws of our society. We have not, and do not seek an exemption from the antitrust laws.

Mr. Chairman, we believe now is certainly the time, particularly in light of the emerging consensus, for Congress to define the FTC's authority vis-a-vis the professions once and for all. To leave it undefined is to leave the definition of FTC jurisdictional to the whim and caprice of whomever has administrative charge of the agency at any given time or to the changing philosophies of executive branch administrations.

Mr. Chairman, we respectfully urge this committee to initiate legislation that will place some reasonable and appropriate statutory limits on FTC jurisdiction and authority with respect to State-regulated professions such as dentistry.

Thank you for your time and attention.

[The statement follows:]

STATEMENT OF DR. DONALD B. BENTLEY, PRESIDENT, AMERICAN DENTAL ASSOCIATION

Mr. Chairman, members of the committee, I am Dr. Donald E. Bentley from Hawley, Minnesota. I am here today as President-elect of the American Dental Association, representing more than 140,000 members, and I am accompanied by Mr. Hal M. Christensen, director of the Association's Washington Office.

The dental profession appreciates this opportunity to present its views on legislation to reauthorize the Federal Trade Commission.

Mr. Chairman, the American Dental Association has some serious concerns with Federal Trade Commission attempts to impose a questionable statutory authority on the practice of dentistry and other state-regulated professions. We so informed this committee in July, 1981 and March, 1982, and very little has changed since then to alter our views.

Those concerns relate primarily to the Commission's efforts to preempt and supersede state laws and regulations covering such things as licensure, examinations and training of dentists, duties that may be performed by auxiliary personnel, supervision of such personnel, accreditation of schools, providing of dental care by non-professionals, and virtually every other aspect of state regulation of the practice of dentistry.

Without repeating the entire litany of our concerns, I must say that they remain today notwithstanding that Congressional attention to this important issue apparently has encouraged the Commission to review its practices and procedures regarding the professions and to ameliorate some of the bureaucratic excesses of the past.

While we welcome the administrative reforms that have been and are being made, we do not believe they provide the permanent remedy that is required. We strongly believe Congress has a responsibility to clearly define the Commission's jurisdiction in order to preserve the traditional role of the states in governing who may practice a health profession, who may not, and under what conditions.

Having said that Mr. Chairman, we sincerely hope the information received at these hearings will be helpful to this committee in taking the first steps toward a new consensus, and we assure you that the dentists of America are prepared to support consensus legislation.

Before outlining our recommendations for legislation in the 98th Congress, it might be helpful to briefly review legislative developments in the 97th Congress. These events form the basis for our hope that consensus is finally possible.

In the 97th Congress, the legislative debate actually began with the introduction of S. 1984, the McClure-Melcher legislation, which set forth restricted statutory parameters for the FTC's authority with respect to state regulated professions and their nonprofit professional organizations. The bill also outlined a number of procedural reforms in FTC proceedings.

The Association supported this proposal unitl the Commerce Committee marked up its own version of an FTC reauthorization, S. 2499, introduced by Senators Bob Kasten (R-WI) and Wendell Ford (D-KY). At that time we supported the Stevens amendment which proposed the inclusion of the professions' section of S. 1984 to be incorporated in S. 2499. This amendment prevailed at committee by a vote of 10–5. It was the only legislation before the Senate that related to FTC regulation of the professions until the introduction of a substitute amendment by Senator Warren Rudman (R-NH).

Like the Broyhill amendment in the House, the original Rudman substitute purported to limit the Commission's attempts to invalidate state laws. Instead, it actually conferred such authority upon a mere finding by the Commission that the state statute in question involved a business or commerical practice and was "anti-competitive."

We objected to that proposal because it would have allowed the Commission to determine the limit of its own authority and to select the state laws it wished to invalidate. The previous presumption of that authority by the Commission is precisely the reason why we are here today.

Mr. Chairman, our experience tells us that this Commission or a future one would have no trouble in making a finding to support its own jurisdiction, which is all that the substitute required. Far from being a prohibition, the substitute, in our opinion, could be construed as an invitation to the Commission to reinstitute proceedings that the Commission launched in 1977, and subsequently relating to dentistry. These proceedings, directly challenged state laws dealing with education, training or experience requirements for dentists, and permissible tasks and duties of dentists and dental auxiliary personnel, on the grounds that the "restrictions imposed by the private and governmental entities on the provision of dental services may be unfair methods of competition or unfair and deceptive acts or practices . . ." (FTC Press Release January 14, 1977).

Mr. Chairman, the state laws we are referring to were passed precisely to prevent the unfettered practice of dentistry by anyone who chose to do so. Furthermore, the FTC hardly needs legislative encouragement to test the limits of its authority when it shows no reluctance under present law for making judgments that impinge on the quality of care provided by professionals. For example, we informed members of Congress last year of a letter from the Food and Drug Administration to the FTC concerning an FTC consent order against the Texas Dental Association. In FDA's letter, that agency indicated that the FTC order, mandating submission of administrative x-rays by dentists to third party payors, could impede efforts of the FDA and professional organizations to reduce the exposure of patients to unnecessary radiation. I would request that a copy of this FDA letter along with the Association's comments be included in the Record. Although the Commission later clarified its order to meet the concerns expressed by the Food and Drug Administration we mention the matter here, parenthetically, to demonstrate the understandable difficulty faced by FTC economists and lawyers in evaluating the health consequences of activities which they view strictly as "business or commercial" practices.

Events in the House of Representatives culminated in last year's crucial floor votes in rejecting the substitute amendment and then adopting the Luken-Lee bill by a wide margin. Following the House votes, the Senate adopted a revised substitute amendment offered by Senator Warren Rudman (R-NH) in conjunction with the omnibus continuing resolution. While these votes did not end the controversy, they did demonstrate that a majority of the members of Congress wanted to limit the FTC's authority to preempt state laws regulating the professions.

Unlike the earlier version offered by Senator Rudman, this revised amendment basically deleted a provision that would have allowed the FTC to determine its own preemption authority. Instead, it said clearly that the FTC could not preempt state statutes relating to the scope of professional practice. The revised Rudman proposal also applied this limitation on preemption authority to FTC's antitrust and consumer protection activities.

Although this legislation did not survive at conference, we believe its emergence at the end of the 97th Congress represented a basis for consensus in the 98th Congress.

At the beginning of the 98th Congress, the dental profession trusts that the momentum for a legislative solution will continue, and we would make the following recommendations toward that objective.

First, any proposed limitation on FTC authority should be permanent in nature. I think everyone can agree that there has been enough discussion, legislative maneuvering, moratoriums, and continuing resolutions on this issue—it is time for a consensus statutory change in the Federal Trade Commission Act.

Second, from all the debate and hearings held in the 97th Congress, it is evident that there is general agreement that the FTC authority should be limited with respect to preempting state laws relating to the practice of the professions. There may be differences of opinion on what constitutes a state law affecting "the scope of practice." There is no doubt that some demarcation of FTC authority is appropriate and necessary.

Third, any limitation on FTC preemption authority should be applicable to both the Commission's antitrust authority and consumer protection powers. This provision in the revised Rudman amendment was an important factor in the Association's support of that proposal.

Finally, we recommend some clarification of FTC jurisdiction with respect to lawful activities undertaken by non-profit professional associations such as the American Dental Association. These activities, which can only be effectively undertaken by members of a profession, are essential to a professional association's service in the public interest. We believe that activities of the ADA, such as credentialing, peer review and accreditation of schools, have led to improvements in standards, in the quality of dental care, and in the nation's oral health.

Let me emphasize that our proposed distinction regarding legitimate activities would not in any way be intended to place dentists, or the members of any profession, beyond or above certain rules and laws of our society. We have not and do not seek an exemption from the antitrust laws. The issue concerning FTC's jurisdiction in this area has been settle by the Supreme Court's 4 to 4 decision in the *American Medical Association* v. *Federal Trade Commission*.

Mr. Chairman, we believe now is certainly the time, particularly in light of an emerging consensus, for Congress to define the FTC's authority vis-a-vis the professions, once and for all. To leave it undefined is to leave the definition of FTC jurisdictional lines to the whim and caprice of whomever has administrative charge of the agency at any given time, or to the changing philosophies of executive branch administrations. We don't think Congress intended this in 1914 when it created the FTC. We don't think Congress wants it today.

Mr. Chairman, we respectfully urge this Committee to initiate legislation that will place some reasonable and appropriate statutory limits on FTC jurisdiction and authority with respect to state regulated professions, such as dentistry. Thank you for your time and attention.

[The following information was subsequently received for the record:]

QUESTIONS OF THE COMMITTEE AND THE ANSWERS THERETO

Question 1. Is it not true that the FDA's sole concern was that the order could be interpreted to be in conflict with their efforts to prevent unnecessary x-rays?

Answer. It definitely is true that the Food and Drug Administration had serious concerns that the order could be interpreted to conflict with that Agency's policies and efforts to prevent unnecessary exposure of patients to radiation.

As stated clearly in the attached letter of July 27, 1982, from Mark Novitch, M.D., Deputy Commissioner, the FDA's concern was that: "The proposed consent order implies that third-party payers can request dental radiographs from dental practitioners for the purpose of cost containment or claims review, regardless of whether the radiographs are necessary for diagnosis or treatment planning."

Dr. Novitch stated further to the Commission: "I would also like to call your attention to the Presidential Directive 'Radiation Protection Guidance to Federal Agencies for Diagnostic X Rays' (FR Doc. 78-2776). I believe the proposed consent agreement can be interpreted as violating recommendations 2 and 11 in the directive, for it implies that third-party carriers can direct dentists to take x-ray examinations regardless of their clinical releveance."

Question 2. The FTC met the FDA's concerns. In doing so, did any substantive changes have to be made in the proposed consent order?

Answer. In a letter dated November 19, 1982, (copy attached), the FTC advised the Food and Drug Administration that it was amending its Federal Register notice of issuance of Final Order by adding a new paragraph to the preamble. The substantive, and very important change in language limits the order to "dental x-rays that are already in existence and were taken for diagnostic purposes" thus preventing third-party payers from demanding radiographs solely for administrative purposes. The letter from FTC to FDA indicates that the latter's concerns were met by inclusion of the additional language in the FTC's final order. As indicated above, we agree with the Food and Drug Administration that the change made by the Commission was important and *substantive. We also believe the correspondence between the two agencies demonstrates a lack of awareness by FTC of the health consequences of some of the orders it issues.*

Question 3. Is it not true that the Texas dental case involved a conspiracy to restrain trade for the purpose of frustrating a cost containment program?

Answer. The American Dental Association was not a party to the Texas Dental Association case but believes it should be pointed out that the so-called conspiracy was an allegation by the FTC and that the Order of the Commission itself states that "the agreement is for settlement purposes only and does not constitute an admission by TDA that the law has been violated . . ."

It is believed further that the Texas Dental Association entered into the consent agreement primarily to avoid protracted and costly litigation.

Finally, it is questionable, in our opinion, whether the unfettered and in some instance routine demanding of radiographs by third-party claims review personnel contributes to cost-containment or cost-escalation. Obviously, an additional administrative cost is involved which probably will be passed on to patients through higher premiums or otherwise.

Question 4. Doesn't this case indicate the need for continued FTC involvement relating to the professions, that business practices can be separated from quality of care issues, and that FTC's actions do not in fact interfere with the quality of care?

Answer. On the contrary, the Texas Dental Association case demonstrates that a matter regarded by FTC solely as a business practice actually involved a serious public health issue. To our knowledge, there was not indication that the Commission ever was concerned or even aware of the possible consequences resulting from unnecessary exposure to radiation generated by the requirement of administrative radiographs.

It is fortunate, in our opinion, that the alertness of the health experts in the Food and Drug Adminstration brought this matter to the attention of the economists and lawyers at the Federal Trade Commission.

FEDERAL TRADE COMMISSION,
OFFICE OF THE SECRETARY,
Washington, D.C., November 19, 1982.

Hon. MARK NOVITCH, M.D.,
Deputy Commissioner, Food and Drug Administration,
Rockville, Md.

DEAR DR. NOVITCH: Thank you for your letter commenting on the Federal Trade Commission's Consent Order with the Texas Dental Association ("TDA"). Your letter has been placed on the public record pursuant to Section 2.34 of the Commission's Rules of Practice.

Your letter expresses concern that the Order could be read to conflict with efforts of the Food and Drug Administration, and others, to prevent excessive radiation. In particular, you express concern tht Part II of the proposed Order might be construed to require individual dentists to supply radiographs to third-party payers and, thus, to actually take radiographs for purposes of third-party review. In addition, you express concern that the Order, as proposed, could prevent TDA from promoting guidelines and ethical considerations regarding when radiographs should be taken.

The Commission wishes to assure you that the Order is not intended to be construed in the manner that gives rise to your concerns. Part II of the Order will prohibit TDA from "[r]equiring, advocating, advising, requesting, or suggesting that" its members refuse to submit dental radiographs already in existence that were taken for diagnostic purposes.[1] Thus, the Order deals with radiographs taken for diagnostic purposes. Moreover, the Order does not require individual dentists to submit any radiographs; it specifically provides that the decisions as to how to deal with third-party payers and as to what, if any, radiographs to submit are to be left up to the individual dentists. With respect to educational as ethical guidelines, on the subject of excessive radiation or efforts, such when radiographs are properly taken, the Order would not prohibit TDA from such educational undertakings.

We understand your concern about excessive radiation and, for that reason, we believe it is important to make certain that the Order is not misconstrued. Therefore, in our Federal Register notice of issuance of the Final Order, we are including in the preamble the following language:

"In response to a comment received from the Food and Drug Administration expressing concern that the order might be construed to conflict with efforts of the FDA to prevent the unnecessary taking of x-rays, the Commission stated that the order prohibits the association from requiring, advocating, advising, requesting, or suggesting that its members refuse to submit to third-party payers dental x-rays that are already in existence and were taken for diagnostic purposes. In addition, the Commission stated that the order should not be misread to require or encourage the taking of x-rays and that the order does not prohibit the association from disseminating information or promulgating professional standards concerning the appropriateness of taking x-rays."

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[1] The order refers to "radiographs or other diagnostic information or other materials."

This language will assure that the provisions of the Order are understood. We understand that representatives of the Food and Drug Administration, after meeting with the Commission's staff, studying the Order, and reviewing the preamble language stated above, believe that the Order will not conflict in any way with efforts to prevent excessive radiation.

Thank you again for writing to the Commission.

By direction of the Commission.

CAROL M. THOMAS, *Secretary.*

DEPARTMENT OF HEALTH AND HUMAN SERVICES,
FOOD AND DRUG ADMINISTRATION,
Rockville, Md., July 27, 1982.

Mr. CAROL M. THOMAS,
Secretary, Office of the Secretary,
Federal Trade Commission, Washington, D.C.

DEAR MR. THOMAS: I would like to comment on the proposed consent agreement (Docket 9139) published by the Federal Trade Commission in the Federal Register, volume 47, number 112, Thursday, June 10, 1982, pp. 25157–8.

The proposed consent order implies that third-party payers can request dental radiographs from dental practitioners for the purpose of cost containment or claims review, regardless of whether the radiographs are necessary for diagnosis or treatment planning. For example, paragraph II of the proposed order requires the Texas Dental Association to cease from entering into a practice that would require or suggest that any of its members refuse to submit dental radiographs to any third-party payer who requests them. Such an order would permit radiographs to be requested by a third-party payer for purposes that are not needed to provide dental care. As written, carriers can request specific radiographs for claims review, and the dentist is required to submit them, regardless of the needless radiation exposure of the patient. As the consent agreement currently is stated, it negates the possibility of dental professional groups promoting guidelines among their members as to the efficacious use of dental radiographs. Such guidelines serve to reduce the exposure of patients to unnecessary radiation. If the intent of the proposed agreement is to allow third-party payers to demand whatever X-rays they feel necessary to guard against fruad, it raises concerns with the Food and Drug Administration (FDA).

The FDA, in conjunction with various dental specialties and associations as well as dental third-party carriers, has been working to minimize the unncessary exposure of dental patients to ionizing radiation. We are continuing to identify nonproductive uses of dental radiographs and, in particular, have been concerned with inappropriate administrative requirements for dental radiographs. Administratively required dental radiographs are those requested by a third party and taken irrespective of the patient's health needs. For example, radiographs that are classified by third-party carriers as prerequisite for reimbursement and which would not normally be taken as part of good dental care are one type of administratively required dental radiographs. Such radiographs should not be taken since they expose the patient to radiation but confer no health benefit to the exposed individual to balance the risk of that exposure. Of course, third parties may appropriately request from dentists those radiographs (or copies) that are or would be taken as part of the appropriate care of that patient. I believe it is this latter situation that the FTC consent order should address and not the former.

Because of our concern about inappropriate administrative dental X-ray requirements, FDA has codified formal recommendations on the matter (21 CFR 1000.60). Subsequent to this we published a document on the specific issue of "Administratively Required Dental Radiographs." I have enclosed a copy for the record. This document states FDA's recommendation that ". . . dental X-ray examinations be performed only after careful consideration of the dental or other health needs of the patient, that is, when the patient's dentist or physician judges them to be necessary for diagnosis, treatment, or prevention of disease." Furthermore, it states that "third parties should not require dental X-ray examinations unless they can demonstrate that such examinations provide a direct clinical benefit to the patient, and the patient's dentist or physician agrees with that assessment. . . . The recommendation is not meant to discourage the administrative use of dental radiographs that have been taken to aid in diagnosis or for treatment purposes. It would be perfectly reasonable for a dentist to furnish such (existing) radiographs to a dental insurance carrier for the purpose of determining eligibility or to clarify benefits."

I would also like to call your attention to the Presidential Directive "Radiation Protection Guidance to Federal Agencies for Diagnostic X-Rays" (FR Doc. 78-2776) (copy enclosed). I believe the proposed consent agreement can be interpreted as violating recommendations 2 and 11 in the Directive, for it implies that third-party carriers can direct dentists to take X-ray examinations regardless of their clinical relevance.

I would urge you to consider these thoughts and recommendations and suggest that the final consent agreement issued differentiate between the situations I have described, that is between administratively required dental radiographs and the administrative use of preexisting radiographs taken primarily for patient care. By stating these distinctions in the final rule you will avoid a potential problem of conflicting federal guidelines. Anything less than such a clarification will result in confusion between the dental insurance industry and the dental profession.

Sincerely yours,

MARK NOVITCH, M.D.,
Deputy Commissioner,
Food and Drug Administration.

The CHAIRMAN. Thank you.

Dr. Sullins?

Dr. SULLINS. Thank you, Mr. Chairman. I am happy to have the opportunity to appear before this committee for the purpose of FTC reauthorization. You have received our written comments, but I would like to make a few, brief remarks.

I am David Sullins, doctor of optometry, and I have practiced optometry in Athens, Tenn., for the past 17 years. I have with me Howard Menaker, AOA's Federal relations counsel.

The American Optometric Association is not asking for exemption from FTC jurisdiction. Furthermore, the AOA is not in support of any efforts to eliminate the FTC's legitimate antitrust authority

However, Mr. Chairman, the AOA is here to go on record that the FTC does not, and should not, have the authority to preempt valid State laws. States have been charged with the authority to pass laws providing for the health, safety, and welfare of its citizens. We feel that States have indeed responded well to this charge.

In addition, the States have had a good track record of legislative reform, as it relates to the professions, whether required by judicial or Federal mandate, as well as meet the needs of their citizenry.

In support of the States' ability to accomplish this, the courts have ruled consistently to uphold the States' laws regarding health care professions. It should be said that the American Optometric Association is not against regulation, but for responsible regulation.

In summary, the AOA is not asking for exemption, nor elimination of valid antitrust scrutiny, but feels strongly that the FTC does not have and should not have the authority to preempt State laws regarding health care professionals.

Gentlemen, we have met with Chairman Miller and his staff, and will continue to meet with them and anyone else to accomplish a sensible clarification of the FTC's authority as it relates to the related health care professions.

Finally, our position was quite ably expressed by Senator Rudman in the close of the 97th Congress, and I paraphrase: The issue for America's doctors of optometry is State jurisdiction and quality control.

I will be happy to answer any questions that I have the ability to do so.

[The statement follows:]

Statement of Dr. W. David Sullins, Jr., American Optometric Association

Mr. Chairman, members of the Committee, my name is David Sullins, and I am a practicing doctor of optimetry in Athens, Tennessee. I currently serve as Chairman of the Federal Relations Advisory Committee of the American Optometric Association. With me is Howard Menaker, AOA's Federal Relations Counsel. The AOA is an organization whose 23,000 doctors of optometry, optometric students and educators across the nation are devoted to improving the vision care and health of the public and promoting the art and science of the profession of optometry. With these objectives in mind, I am proud to represent the AOA here today to once again discuss its views concerning the authority of the FTC.

Much has changed and yet much has remained the same in the two years since the AOA last appeared before this Committee. Since then, we all survived long weeks and months of debate, discussion and dialogue concerning the reauthorization of the FTC. But despite the efforts of this Subcommittee and its Chairman, Senator Kasten, and the bill which emerged from the complete Commerce Committee, we came out of the last Congress with no Authorization. It is the hope of the AOA that this will not happen again. For the Commission to exist without clear definition of its authority and role serves the interest of no one, and in fact is why we are here today—to ask the Congress to clarify the sometimes hazy parameters of FTC jurisdiction.

One of the areas in which more clarity is needed is the question of the authority of the FTC to override or preempt valid state laws concerning the professions which are subject to state regulation. It has been, and will continue to be, the firm belief of the AOA that not only does the FTC lack the authority to preempt state health care laws, but it should not be given such authority in the future. The state legislatures and the people they represent are certainly qualified, experienced and competent to determine what legislation is necessary and desirable in the regulation of health care professionals. Furthermore, since the states have been given the mandate to provide legislation protecting the health, safety and welfare of their citizens, FTC Attempts at preemption of state laws concerning the professions would be a stab at the heart of our system of federalism and representative democracy.

I am not a lawyer, and do not pretend to understand all of the principles of administrative and constitutional law, but our counsel has advised me that any administrative agency only has the power granted to it by the U.S. Congress. Our lawyers have discussed the legal aspects of FTC jurisdiction in legal briefs and previous testimony, so I will not go into the arguments here. But, it is necessary to point out that the Congress that actually enacted the laws providing for rulemaking power of the FTC did not manifest an intention to permit the FTC to strike down valid state health care laws.

The Commission itself has indicated that it recognizes that their authority to adopt rules preempting state laws is unsettled and has not been fully resolved by the courts. (See the Advance Notice of Proposed Rulemaking in Eyeglasses II, in the Federal Register of December 2, 1980 at p. 79828). This is an understatement of the problem. The Court of Appeals' decision in *American Optometric Association* v. *F.T.C.*, 626 F. 2d 896 (D.C. Cir. 1980), which suspended and remanded the preemption and advertising provisions of the Eyeglasses I Rule, casts doubts on the Commission's authority to preempt in this area. Although the Court did not decide the issue, it stated (626 F. 2d at 910):

"The Commission's proposed pre-emption of state law is almost as thorough as human ingenuity could make it. Consequently, the Commission has at least approached the outer boundaries of its authority and may have infringed on that deference to the states' exercise of their police powers dictated by the principles of federalism. The rule therefore raises several interrelated issues: Did Congress authorize the Commission to pre-empt state laws? If so, did the scope of the Commission's delegated power permit it to pre-empt state laws to the extent of pre-empting the whole field of ophthalmic advertising? Does the "state action" doctrine of *Parker* v. *Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.ed. 315 (1943), forbid the agency to issue this rule? Has the Commission exceeded its jurisdiction in treating the states as persons under the Magnuson-Moss Act?"

The unsettled nature of the question was also reflected in the attempts in the 97th Congress to deal with the problem. The House of Representatives, by a vote of 245-155, voiced its opinion that the FTC should cease all actions against state regulated professionals until such time as the Congress had clarified the Commission's authority; and the legislation passed by the Senate Commerce Committee was a laudable attempt to specifically set out the limits of the FTC's jurisdiction.

I would like to again stress to this Subcommittee that it is the position of the AOA that not only does the FTC lack the authority to preempt state health care laws, but it should not be given such authority in the future, as a matter of sound public policy. The regulation of health and vision care, as well as other professional services, is an area where the States have a traditional and fundamental interest. It is a subject which involves more than economic considerations, for it directly implicates the vital interest of public health and the total well-being of the consumer.

Vision care and other health care regulation has generally been a matter of State—not Federal—governance. Acting pursuant to their respective police powers, all States supervise and regulate the delivery of vision care to their citizens by optometrists and physicians. The State laws have been adopted as part of the regulatory patterns designed to meet local conditions and thereby protect the public health and welfare.

The whole history of the subject of State regulation in the health care field establishes and vindicates the authority of the States to legislate comprehensively in this field in accordance with relevant constitutional limitations. Such legislation is subject to judicial review, and state laws in this area have been upheld on all levels of the court system.

This is an area where a uniform national approach is neither appropriate nor desirable, and is certainly not required. Essentially, health care is provided by individual practitioners or entities within a particular State to people who live there, and circumstances and conditions may vary from State to State and from time to time within a State. The State legislatures have first-hand knowledge of local problems and circumstances derived from their own experiences and studies, as well as their constant contacts with their constituents. They also provide a democratic forum for all citizens of the State to express their views and needs, and they are elected by and directly accountable to consumers in their States. The day has long since passed when the Commission can ask the public and the courts to "assume . . . that . . . states will act against the interests of their citizens and in defiance of the dictates of the Constitution". *American Optometric Association* v. *F.T.C., supra*, 626 F.2d at 913.

Notwithstanding the evidence of outstanding consumer protection by the states, some have argued that they do not do enough and that an additional layer of government regulation is necessary. In answer, let us look at the one health care case where the FTC sought to preempt state laws which it felt were not in the public interest. This is the 1978 Trade Regulation Rule on Ophthalmic Goods and Services, known as "Eyeglasses I".

It has been suggested by some that the advertising provisions of the FTC's Eyeglasses I Rule were necessary and have benefited consumers by lowering the price of eyeglasses. In fact, the U.S. Supreme Court decided the case of *Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977) in June of 1977, over a year before the FTC's rule was issued. This decision clearly established the right of professionals to advertise. Accordingly, total bans on professional advertising were unconstitutional and unenforceable, and many states withdrew their previous bans and reconsidered new laws in keeping with the Court's decision.

It was not until July 1978 that the FTC issued its trade regulation rule in Eyeglasses I, and it was immediately challenged in the courts. The U.S. Court of Appeals for the District of Columbia set aside those portions of the Rule dealing with advertising and remanded them to the Commission, saying the decision in *Bates* had worked changes that altered the very nature of the case. Therefore, it is inappropriate to claim that the preemption provisions of the FTC's rule were the cause of any reductions in the price of eyeglasses which might have occurred.

Furthermore, in the years since the *Bates* decision, new forms of optometric practice have grown and expanded, and new technologies in ophthalmic products have constantly been developed. If prices have, in fact, dropped, these market forces surely have had far more effect than a remanded FTC rule.

The American Optometric Association has stood at the forefront of providing for the visual welfare of our nation. It has encouraged measures in the states which will protect and aid the citizens of those states, and opposed those which would not. The AOA does not stand for "no regulation", merely for "responsible regulation". But the public must have confidence that state laws adopted by their elected officials will not be overruled by the extraordinary power of an appointed 5-person federal commission.

Some critics have charged that we are trying to dismantle the FTC or cripple it beyond repair, so that professionals will be free from traditional antitrust restraints on boycotts, pricefixing and other activities. Mr. Chairman, we do not come today in support of any effort to exempt professionals from the FTC's legitimate antitrust enforcement. As Senator Rudman commented in the debate during last year's "lame duck" session, the issue for America's doctors of optometry is state jurisdiction and the quality of health care.

We have been meeting with Chairman Miller and his staff to try to work out a solution to the problem which is fair and provides a role for the FTC without disrupting health care. We look forward to continued cooperation and dialogue with them and with members of this Committee, as we all work for a sensible clarification of the authority of the FTC with respect to state regulated professions. Thank you, and I shall be happy to answer any questions you or the members of the Subcommittee may have.

The CHAIRMAN. Thank you.

Mr. Hagman?

Mr. HAGMAN. Mr. Chairman and members of the committee, I am Bob Hagman and I am licensed to dispense eyeglasses by the State of Ohio. I am a graduate of Ohio State University and president of Ohio State Optical Co.

This year, I am also serving as first vice president of the Optician's Association of America.

If it were not for the presence of opticians in the marketplace, persons in need of corrective eyewear would have no choice but to buy their eyeglasses and contact lenses from prescribers. We are certain that such a situation would have a serious anticompetitive effect on the cost of prescription eyewear, as well as limiting the consumers' choice and convenience.

I am here to urge the Congress to reauthorize the Federal Trade Commission and to renew its regulatory jurisdiction over the commercial and business activities of professionals. The FTC's investigatory and enforcement initiatives in the optical industry have helped to promote increased competition among providers of ophthalmic goods and services, as well as to protect consumers from unfairness and deception.

These initiatives are in the public's best interest and should be allowed to continue. The FTC issued the Eyeglass I trade regulation rule in 1978. One very important provision of this rule mandated the release of prescriptions by doctors to consumers, thereby insuring their freedom to obtain prescribed eyewear from providers of their own choosing. This rule made it easier for consumers to comparison shop for the eyeglasses and contact lenses that best meet their own individual needs, preferences, and budgets.

The attendant increase in competition resulted in reduced prices in many States. The average price of soft contact lenses in 1978 when the Eyeglass I rule took effect was $256. By 1981, the price dropped to $146, in 1978 dollars.

This startling decline in retail prices is largely due to the FTC's Eyeglass rule and to the increase in competition that the rule helped to promote. This result was accomplished without preempting the law of any State. This regulation should be continually monitored at the Federal level to enforce it, and to inhibit future violations.

The prescription release rule is meaningless unless it is enforced. If Congress exempts optometrists and ophthalmologists who sell eyeglasses and contact lenses from FTC jurisdiction, competition will be sharply reduced, to the detriment of more than 124 million Americans who wear eyeglasses and contact lenses.

Since 1978, the FTC has also been investigating the effects of a variety of other restrictions on providers of ophthalmic goods and services. The investigation has focused on the effects on consumers of restrictions on contact lens dispensing and the duplication of eyeglasses by opticians. Restrictions on contact lens dispensing and eyeglass duplication by opticians reduce competition by depriving consumers of access to the only providers who are not directly controlled by the prescribers.

While we await the results of these investigations, the important point we wish to make is that it is vitally important for the FTC to be in a position to continue such investigations and studies. The Commission is also examining the effects of restrictions imposed on the form of practice of professionals which limit the location of their offices, prevent their employment by corporations and ban them from operating branch stores and from using trade names.

These restrictions generally result from the actions of State trade associations of professionals or the regulations written by State boards, controlled by professionals.

Most of these restrictions were not enacted or contemplated in the State legislatures by the elected officials, but were written into private codes of ethics, or as requirements for membership in professional associations, or by regulatory boards.

It is not a sufficient answer to suggest that associations of professionals are self-regulating. If they were, there would have been no need for the FTC's mandate to release prescriptions to the consumer. Nor is it an answer to suggest that such matters fall within the exclusive purview of the States.

This is borne out by the fact that in the last session of the Congress, the association of State attorneys general supported the continued jurisdiction of the FTC. Their official support of FTC jurisdiction is proof enough of this need.

The CHAIRMAN. They did it again yesterday, also.

Mr. HAGMAN. Thank you, Senator.

The Federal Trade Commission has unique resources for conducting sound studies of the effects of such restrictions on competition among providers, upon consumers and upon the Nation's economy. The individual States simply do not have the resources needed to undertake such economic studies within their own boundaries, much less on a national scale.

An exemption of professionals would be an open invitation to optometrists working through their State and national associations and State boards of optometry which are controlled by optometrists to regulate dispensing opticians right out of business. If this happens, competition will be reduced, prices will rise, and consumers will suffer, particularly the poor and the elderly, many of whom cannot function without corrective eyewear.

Thank you for this opportunity to address this committee.

[The statement follows:]

STATEMENT OF ROBERT E. HAGMAN ON BEHALF OF THE OPTICIANS ASSOCIATION OF AMERICA

Mr. Chairman and members of the Subcommittee: I am Bob Hagman and I am licensed to dispense eyeglasses by the state of Ohio. I am a graduate of Ohio State University and President of Ohio State Optical Company. My family-owned company has been in the retail optical business for 58 years. We presently employ 24 people and sell eyeglasses and contact lenses from 7 stores in metropolitan Columbus, Ohio.

This year I am also serving as First Vice President of the Opticians Association of America. With me today are our General Counsel, Donald S. Dawson of the firm Dawson, Riddell, Fox, Holroyd & Jackson and James D. Hawkins, our Executive Director.

The members of our Association support reauthorization of the Federal Trade Commission. We oppose legislation that would exempt the professions, including ophthalmologists and optometrists who sell eyeglasses and contact lenses, and their state and national associations from anti-trust and consumer protection laws which are administered by the FTC.

The Opticians Association of America (OAA) represents optical dispensing firms, state opticians associations, and individual dispensing opticians. Our members include large national chains as well as small partnerships and proprietorships that operate retail optical stores in all 50 states, the District of Columbia, and Puerto Rico.

If it were not for the presence of opticians in the marketplace, persons in need of corrective eyewear would have no choice but to buy their eyeglasses and contact lenses from prescribers. We are certain that such a situation would have a serious anti-competitive effect on the cost of prescription eyewear as well as limiting the consumer's choice and convenience.

I am here to urge the Congress to reauthorize the Federal Trade Commission and to renew its regulatory jurisdiction over the commercial and business activities of professionals. The FTC's investigatory and enforcement initiatives in the optical industry have helped to promote increased competition among providers of ophthalmic goods and services as well as to protect consumers from unfairness and deception. These initiatives are in the public's best interest and should be allowed to continue.

As a result of an extended investigation of public and private restrictions on ophthalmic advertising, for example, the FTC issued the Eyeglasses I trade regulation rule in 1978. One very important provision of this rule mandated the release of prescriptions by doctors to consumers, thereby ensuring their freedom to obtain prescribed eyewear from providers of their own choosing.

The Eyeglasses I rule made it easier for consumers to comparison shop for the eyeglasses and contact lenses that best meet their own individual needs, preferences, and budgets. The attendant increase in competition among providers resulted in reduced prices in many states. Surveys performed by Health Products Research of Morristown, New Jersey, for example, indicate that the average price for soft contact lenses in 1978 when the Eyeglasses I rule took effect was $256. By 1981, the drop in average price was equal to $146 in 1978 dollars. This startling decline in retail prices is largely due to the FTC's Eyeglasses rule and to the increase in competition which the rule helped to promote.

This result was accomplished without pre-empting the law of any state. This regulation shold be continually monitored at the federal level to enforce it and to inhibit future violations.

Because consumer access to prescriptions ensures competition among the three groups of providers of eyeglasses and contact lenses, the prescription release rule is meaningless unless it is enforced. If Congress exempts optometrists and ophthalmologists who sell eyeglasses and contact lenses from the applicability of the prescription release rule or takes other action which prevents the FTC from enforcing the rule, competition will be sharply reduced to the detriment of the more than 124 million Americans who wear eyeglasses and contact lenses.

This could be disastrous. Consider for a moment the market for ophthalmic products. It is estimated that in 1981 consumers purchased 48.5 million complete pairs of eyeglasses in addition to 7.9 million eyeglass lenses, 2.4 million frames, and 5.9 to 7.9 million pairs of contact lenses. Is there a valid reason why all of these 64 million 700 thousand items should be purchased only in the offices of the optometrists who prescribe them?

Recent statistics compiled by the Optical Manufacturers Association indicate dispensing opticians, including large national chains and small independents, dispensed approximately 42 percent of the eyeglasses and contact lenses sold in the United States. Opticians' share of the market should be larger, but unforunately opticians have already been excluded by the results of local news, regulation and litigation, frequently instigated by our "professional" competitors and, as a result, consumers in those areas have paid higher prices.

Since 1978, the FTC has also been investigating the effects of a variety of other restrictions on providers of ophthalmic goods and services. The FTC's Eyeglasses II investigation has focused on the effects on consumers of restrictions on contact lens dispensing and the duplication of eyeglasses by opticians.

Restrictions on contact lens dispensing and eyeglass duplication by opticians reduce competition by depriving consumers of access to the only providers who are not directly controlled by prescribers.

As part of its Eyeglasses II investigation, the FTC staff has completed a draft study entitled "A Comparative Analysis of Contact Lens Fitting by Ophthalmologists, and Opticians".

A limited number of the eye doctors, opticians, and contact lens technicians who assisted the FTC in the conduct of the study have seen the results in confidence.

While we await public release of the study, the important point we wish to make is that it is vitally important for the FTC to be in a position to continue such investigations and studies in the future.

The FTC recognizes that other existing restrictions can limit competition and thereby harm the consumer. In its on-going Eyeglasses II investigation, therefore, the Commission is also examining the effects of restrictions imposed on the form of practice by professionals, which limit the location of their offices, prevent their employment by corporations, and ban them from operating branch stores, and from using trade names.

These restrictions generally result from the actions of state trade associations of professionals or the regulations written by state boards controlled by professionals. Most of these restrictions were not enacted or contemplated in the state legislatures by the elected officials, but were written into private codes of ethics, or as requirements for membership in professional associations, or by regulatory boards.

Why should the American consumer not enjoy the convenience of shopping in a shopping center for eyeglasses and contact lenses? Why should an optometrist not work for a corporation? Why should a company employing an optometrist not do business through branch stores? Why should an optician not lease space to an optometrist? These and other questions may never be answered to the American consumers' satisfaction if the Federal Trade Commission is prevented from addressing them.

It is not a sufficient answer to suggest that associations of professionals are self-regulating. If they were, there would have been no need for the FTC's mandate to release prescriptions to the consumer. Nor is it an answer to suggest that such matters fall within the exclusive purview of the states.

This is borne out by the fact that in the last session of the Congress, the Association of State Attorneys General supported the continued jurisdiction of the FTC. These officials are keenly sensitive to issues of states rights and are imbued with the desire to preserve and enforce state laws. Their official support of FTC jurisdiction is proof enough of need.

The Federal Trade Commission has unique resources for conducting sound empirical studies of the effects of such restrictions on competition among providers, upon consumers, and upon the nation's economy. The individual states simply do not have the resources needed to undertake such economic studies within their own boundaries, much less on a national scale. Even if they did, few would be motivated to do so. In any event, 50 separate studies would be a tremendous waste of the states' energies and financial resources.

What will happen if the professions are exempted from the anti-trust and consumer protection authority of the Federal Trade Commission? Such an exemption would be an open invitation to optometrists working through their state and national associations and state boards of optometry (which are controlled by optometrists) to regulate dispensing opticians right out of business.

If this happens, competition will be reduced. Prices will rise. Consumers will suffer; particularly the poor and the elderly, many of whom cannot function without corrective eyewear.

For all of the foregoing reasons, the Opticians Association of America respectfully urges the Congress to reauthorize the Federal Trade Commission. In so doing, we strongly recommend that the professions not be exempted from the FTC's regulatory jurisdiction. Neither competition in the optical industry nor the best interests of consumers would be served by enactment of such special interest legislation.

The CHAIRMAN. Thank you, very much.

Ms. Cole?

Ms. COLE. Mr. Chairman, I am Eunice Cole, president of the American Nurses' Association, a professional association representing 170,000 registered nurses. Appearing with me today is Tom Nickels, ANA legislative counsel.

We appreciate this opportunity to present our views on the reauthorization of the Federal Trade Commission. We are concerned with the efforts to exempt State-regulated professions from FTC jurisdiction.

In our written statement, we cited numerous reasons for the continuation of the Commission's authority. In this statement, I will discuss one case the FTC is currently litigating which clearly reflects the need for continued FTC involvement.

In 1981, the Commission began to investigate whether the Mutual Assurance Society of Alabama and the Medical Association of Alabama might be in violation of the FTC Act. The Medical Association is comprised of 90 percent of the physicians of the State. Mutual issues malpractice insurance for physicians in Alabama. Mutual is organized under the sponsorship of the Medical Association with which it shares some directors and is owned by the physicians that it insures.

The Commission focused on acts by Mutual and the Medical Association, allegedly directed at restricting the use of nurse practitioners and rural health clinics. Nurse practitioners provide basic health care, including making diagnosis and prescribing treatment in simple cases under medically established protocols and act to increase the availability of health care where there are not enough doctors to provide adequate services.

The Rural Health Clinics Services Act of 1977 encourages clinics staffed by nurse practitioners by making such clinics eligible for medicaid and medicare reimbursement. Congress enacted this provision in order to improve the availability of health care in rural areas.

The act authorizes nurse practitioners to work without a physician continuously present at the clinic unless State law requires otherwise. As a result, clinics were established in Alabama in which nurse practitioners worked without continuous on-site supervision by physicians. The nurses work under protocols established by a physician who is always available for consultation by telephone.

No State statute prohibits this arrangement; however, in January 1978, the Alabama State Board of Medical Examiners, which consists of the 15 directors of the Alabama Medical Association, issued guidelines stating that independent diagnosis and treatment by nurse practitioners was illegal.

Two months later, the Attorney General of Alabama held that the board's action was unauthorized because the regulation of nursing was under the jurisdiction of the board of nursing, not the board of medical examiners.

Nevertheless, in October 1978, the board of medical examiners drafted a second set of guidelines which provided that the supervising physician, and not a nurse practitioner, must see a patient initially, make the diagnosis and prescribe the treatment. In May of

1979, the Alabama attorney general again ruled their guidelines were illegal.

Mutual's role in this controversy came to light through its position regarding nurse practitioners. In February 1979, after the attorney general's first ruling invalidating the board's restrictions, Mutual, which has members and directors in common with the board and the Medical Association, published an advisory in a publication of the Medical Association.

It stated that Mutual's malpractice insurance coverage would follow the board's policy and that it is only legal to use nurse practitioners in cases where they have direct supervision.

In April 1979, Mutual's board of directors reaffirmed this position in applying its coverage to physicians involved in rural health clinics. Consequently, Mutual's policy caused the temporary closing of several rural health clinics because the physicians insured by Mutual were concerned that their insurance would no longer protect them against claims rising out of their supervision of the clinic. Some clinics did intend to reopen, only after they could obtain substantially more expensive malpractice insurance from other sources, thus increasing costs for the clinics.

These actions of the Medical Association, the board of medical examiners and Mutual clearly restrict nurse practitioners, their physician colleagues, and rural health clinics from engaging in lawful conduct.

During the last session of Congress, we supported a bipartisan compromise amendment sponsored by Congressmen Dingell, Broyhill, Florio, and Lent in the House. We believe this was a fair and reasonable approach to the professions issue, and continue to support it.

We urge the committee to accept this compromise, to oppose a total exemption and to avoid any alleged compromise which is, in fact, cause to complete exemption.

Mr. Chairman, we appreciate the opportunity to present our views on this issue. Thank you.

[The statement follows:]

Statement of Eunice Cole, President, American Nurses' Association

Mr. Chairman, I am Eunice Cole, President of the American Nurses' Association, a professional association and labor organization representating 170,000 registered nurses nationwide. I appreciate this opportunity to present the views of the Association with respect to the reauthorization of the Federal Trade Commission.

We are specifically concerned with efforts to exempt state regulated professions from the jurisdiction of the FTC. Although registered nurses would qualify for such an exemption, we remain steadfastly opposed to any provision which would exempt professionals from FTC scrutiny. This is an issue of utmost importance to our membership, who were extremely active in opposing efforts in both the 96th and 97th Congresses to remove the Commission's jurisdiction over the professions. We intend to continue to actively oppose similar efforts in this session of the Congress.

THE SIGNIFICANCE OF THE HEALTH CARE MARKET

It is abundantly clear that the consumer and governmental interests in the health care market are substantial. According to the Health Care Financing Administration, an estimated $287 billion was spent for health care in calendar year 1981, an amount equal to 9.8 percent of the Gross National Product. Health care spending increased by 15.1 percent from 1980 to 1981, only slightly lower than the 15.8 percent increase from 1979 to 1980. Health spending continued to grow faster than the GNP, which increased 11.4 percent in 1981. On a per cpaita basis, 1981 health spending from all sources amounted to $1,225. Of that amount, $524, or 43 percent, represented spending by Federal, State, and local governments.

Medicare and Medicaid combined to pay $73 billion in benefits in 1981, as compared to $2 billion in 1965. Moreover, spending for physician services increased 16.9 percent to $55 billion. There are no indications that future costs will cease to escalate rapidly; in fact, the Health Care Financing Administration has reported that, assuming no major reforms, health care costs can be expected to triple during the 1980s. (U. S. Department of Health and Human Services, Health Care Financing Administration, Health Care Spending Bulletin, July 21, 1982.)

In the face of these staggering statistics, it is clear that health care inflation is an issue of critical importance. Yet with such a large sector of our economy at stake, where costs continue to spiral rapidly, some suggest curtailing FTC jurisdiction in the health care market. This action would eliminate the authority of the only agency with a clear consumer protection mandate, whose activities can serve to mitigate inflationary pressures by improving competition and consumer information. The Administration has repeatedly stated that a healthy dose of competition would help eliminate the devastating effects of inflation in the health care market. We agree that increased competition would be beneficial to the health care system. Yet one of the paradoxes of competition is that the general rules of the game have to be established and enforced in order to assure that all competitors will have the opportunity to compete. Any competitive market requires monitoring and intervention from time to time to guarantee that competition is open and fair. We believe that antitrust enforcement offers an excellent opportunity to counterbalance the potential of monopoly power through scrutiny of such activities as barriers to entry into particular markets, territorial or market restrictions, economic boycotts, price fixing, tying the purchase of one service to another, and restricting the flow of truthful information between buyers and sellers. It seems unlikely that health care providers, let alone consumers, would be protected from the adverse consequences of these activties if the antitrust laws were not applied to the professions. The FTC has been fulfiling this necessary role for some time, and any movement toward increased competition makes their presence even more critical if inflationary pressures in the health care market are to be relieved in a fair and equitable manner.

THE IMPACT ON CONSUMERS

The American Nurses' Association has traditionally defended the rights of consumers in the health care arena. Therefore, we believe that it would not be in the best interest of the consumers of health care if the FTC were stripped of its authority to conduct investigatory and regulatory activities regarding the professions. Consumers must have guidance, impartial information, and protection in order to secure good health care at a fair price. Numerous FTC activities have served consumer interests in the health care field. For example, the Eyeglass Rule permits advertising of price information concerning eyeglasses and eye examinations. Following the issuance of this rule, the CPI for eyeglasses increased by 4.3 percent, as compared to 9.1 percent of all goods and services, and over 13 percent for medical care generally. In another inquiry, the FTC investigated state regulations which discouraged pharmacists from dipensing low-cost generic drugs instead of name brands. These examples reflect the fact that the markets for many professional services are far from competitive, resulting in higher prices to consumers than would exist if more rigorous competition prevailed.

Consumers of professional services should not be precluded from having the protection which FTC oversight provides. Investigatory and regulatory activities are needed to help assure the free flow of commercial information, which is critical to informed decisions by consumers about their own health and health care. Congress created the FTC in 1914 to encourage competition and deter business misrepresentation. It must not be prevented from fulfilling that much-needed function.

THE FEDERAL TRADE COMMISSION AND THE PROFESSIONS

Since the Supreme Court's landmark decisions in *Goldfarb* v. *Virginia State Bar and Natural Society of Professional Engineers* v. *United States*, confirmed that the professions are subject to the federal antitrust laws, the FTC has asserted its jurisdictions over professionals and professional groups, and has investigated potentially anticompetitive behavior performed under the guise of "professionalism." At the same time, however, the FTC has distinguished between legitimate, self-regulatory actions by professionals and their associations, and unwarranted restraints on professional practice with the purpose or effect of stifling competition and impeding innovation.

As the professional organization for registered nurses, the American Nurses' Association believes that autonomy over the content and practice of nursing is our legitimate responsibility. The regulation of educational standards, admission to practice, certification of programs, and ethical standards are properly within the purview of a professional association. In addition, we believe that the licensure of health professionals is a state concern, and that the authority to grant licensure resides within state governments, not the federal government. State licensure boards should be composed of a majority of members from the profession being licensed, along with consumer representatives. It is, without question, the responsibility of the states to ensure the health and safety of their citizens. To the best of our knowledge, no one is arguing with this point.

It has been stated that the FTC is attempting to circumvent the role of the states and regulate the activities of the professions. We believe these concerns are unjustified, and instead see the FTC assuming the role of watching over such activities. As we will indicate in this statement, there are significant abuses which occur at the state level, for which the states have not provided a remedy. It is at this point, where no realistic legal mechanism exists to counter anticompetitive practices, that the FTC should be permitted and encouraged to intervene.

We believe that the opposition to the professions exemption by the National Association of Attorneys General speaks quite strongly to the need for federal antitrust authority and enforcement. Regrettably, attacks on anticompetitive practices have not generally come from state authorities, and, in some states, regulations have enabled professional groups to enforce anti-competitive codes of conduct in the market. Often, states do not have the resources to pursue antitrust violators by professionals. Moreover, four states have no antitrust laws, nine states have antitrust laws which are not applicable to the services of professionals, and twenty-eight states have antitrust laws that apply, but have never used the legislation. As a result, it seems clear that the FTC continues to be needed as one possible remedy to some of the problems which now occur on the state level.

Another major complaint directed at the FTC is that it is attempting to regulate the professions. Such an assertion is incorrect in that the FTC has actually acted to deregulate the economy by scrutinizing restraints on competition among professionals which have been imposed by government regulations. Competitive forces are often frustrated by numerous state regulations. The occupational deregulation efforts of the Commission have challenged restrictions on advertising and other forms of commercial practice by competing health professionals. The FTC's emphasis has been to unburden the health care sector in order to permit free and open competition. Thus, the FTC has attempted to ensure that free and fair competition exists in the professions, providing consumers with the information and ability to protect themselves in the marketplace.

THE IMPACT OF NONPHYSICIAN PROVIDERS

As FTC actions have benefited the consumer, so have its actions worked against the domination of nonphysician health providers by physicians and other sectors of the health care industry. If denied jurisdiction over professional groups, the FTC could no longer apply antitrust and consumer protection remedies to anticompetitive practices in the delivery of health services. As this testimony will indicate, these violations are numerous, ongoing, and in need of resolution.

There are four major obstacles which currently prevent nurses from fully practicing their profession which either have been or can be addressed by the FTC. These barriers to the achievement of true competition in the health care market result in frustration and lack of choice for consumers in selecting quality and cost effective health care services. They are:

(1) Restrictive licensure laws;
(2) Denial of access to facilities;
(3) Denial of third-party reimbursement; and
(4) Denial of access to physicians.

1. Restrictive licensure laws

It is the position of the American Nurses' Association that protection of the health and welfare of the public is the foundation of any legislation or regulations with respect to the practice of health professionals. The public's health and welfare should be protected with as minimum an amount of governmental regulation as necessary. However, checks and balances must exist between governmental interests and the interests of self-regulated professions.

As we have stated above, we believe state licensure boards for the professions should include representatives of the public, but the majority of members of such boards should be from the profession being licensed. Unfortunately, state professional licensure laws have been utilized to limit particular professions to specified functions under certain circumstances. State medical boards have acted to limit the practice of nurses, and prevent them from providing services which they have been trained to perform. For example, in Georgia, the State Medical Association and the Board of Medical Examiners tried to amend the Medical Practice Act to legislate a specific nursing specialty out of existence. In Alabama, the Board of Medical Examiners proposed guidelines that would have prevented nurses from functioning without a physician present, even though the State Attorney General ruled that the proposal conflicted with the state Nurse Practice Act. We will discuss this particular case in greater detail later in this statement. Also, in Arkansas, the Board of Medicine is attempting to limit to two the number of nurses that a physician may employ or collaborate with at any one time, and is asking to review the educational requirements of professional nurses, a function within the sole purview of the Arkansas State Board of Nursing.

Such action only serves to exclude qualified state-licensed providers from the market, thereby limiting competition, reducing consumer choice, and frustrating national health policy. These actions are even more egregious when considering the fact that the populations being served currently have little or no access to health services. Nurses strive for the opportunity to offer their unique form of health services to the public, not as a substitute for but as a complement to services offered by the medical profession. Rural areas and the inner city desperately need health care services, and nurses often represent the only provider willing to offer these services. Yet the medical groups in the above examples, while rejecting the chance to practice in such areas themselves, nevertheless attempt to restrict a nurse's willingness to provide desperately needed health care services.

2. Denial of access to facilities

Many health care providers need the services of an inpatient health care facility in caring for their patients, thereby necessitating admitting privileges. Refusal of such privileges represents another imposed restraint on practice which can be critical. To the extent that hospital access is necessary to deliver a particular service, competition by practitioners who are denied such privileges can be severely limited or even eliminated, resulting in deleterious effects on the practitioner denied privileges and the consumer who wishes to utilize his or her services.

Three nurse midwives were denied hospital privileges by obstetricians at the Washington Hospital Center, even though the obstetricians admitted that the midwives had had no complications, had been well accepted by patients and staff, and were practicing within the terms of their licenses. At Hendersonville Community Hospital in Tennessee, officials promised privileges to two nurse midwives, then changed their minds after staff pediatricians announced they would not examine any babies delivered by the midwives. Their concerns were unrelated to the competence of the nurse midwives, but were motivated by economic reasons. When the midwives attempted to secure privileges nearby at Vanderbilt University Hospital, they were denied because of insufficient facilities to accommodate their practice, even though the hospital has actively encouraged the local physician community to use the facility for normal deliveries. In spite of limited resources, the midwives filed suit in U.S. District Court, and were successful in that suit. The litigation, however, is far from completed.

These instances reflect the difficulties experienced by nurses throughout the country, opposition from doctors who disapprove of their training, disagree with their practice, or fear them as competition for patients. Those most seriously harmed, however, are consumers who are restricted in their range of available choices and denied access to nonphysician providers.

3. Denial of third-party reimbursement

Patients have an obvious financial incentive to utilize providers who are eligible for payment under their insurance policies. Unfortunately, third-party carriers have refused to reimburse classes of lawful practitioners operating within their scopes of practice for professional services otherwise covered by the particular policy. Such actions can virtually shut down the practice of a nonphysician provider. By choosing which health providers are eligible for reimbursement any insurance plan with market power can likely deny potential competitors access to significant market segments.

Although the case of the *Virginia Academy of Clinical Psychologists* v. *Blue Shield of Virginia* is the best known regarding health insurance discrimination against nonphysician providers, there are numerous instances of similar practices by third-party payors. The well known and respected New York Maternity Center Association, a birthing clinic in Manhattan under the direction of nurse-midwives, has had great difficulty in obtaining eligibility status from various carriers. In many instances, patients were forced to use the more costly inpatient hospital services in order to receive maternity benefits. In Washington, DC, Blue Shield reimburses services of psychiatric mental health nurse specialists at a rate lower than nonnurse therapists. The rate is so unrealistically low that patients must pay a large out-or-pocket fee, thereby creating a disincentive to utilize their services.

We have additional documented instances where patients have had to discontinue therapy with nurse providers because of the financial strain of the out-of-pocket fee. All too often, insurers have responded to pressures by professionals who attempt to prevent competitors from entering the market or resist changes that would make the market more competitive. The free opportunity to select from among alternative options is once again restricted.

4. *Denial of access to physicians*

Many physicians have been discouraged from cooperating with nonphysician providers, and some have been threatened with loss of certain essentials of professional practice, such as hospital privileges or malpractice insurance. This kind of peer pressure by physicians on their colleagues is often quite subtle and difficult to document, and can take the form of refusal of referrals by or from other physicians, or unwillingness to cooperate in joint professional activities.

In Alabama, physician sponsors of rural health clinics staffed by nurses, who are often the sole source of primary care, have had difficulty obtaining malpractice insurance (see below). Also, the physician in our above example from Nashville, Tennessee, who desired to form a pracice with two nurse midwives, was informed by his malpractice carrier that his practice situation assumed risks of such proportion that they would not renew his liability insurance. As a result, the physician was ostracized by his peers, and decided that it would be in his best professional and economic interest to leave the state, and establish another medical practice at great expense and loss. It is obvious that a physician who cooperates with nonphysician providers often does so at his own peril.

THE CASE IN ALABAMA

The Commission is currently involved in an investigation which is extremely relevant to the issue of where the professionals should remain within its jurisdiction. On December 3, 1982, the United States District Court for the Northern District of Alabama rejected an effort by a physician-controlled malpractice insurance company to block an FTC investigation into possible anticompetitive activities by physician organizations in Alabama to limit the practice of nurse practitioners in rural health clinics. The court found the FTC investigation proper and ordered the physician-owned company to comply with a subpoena issued by the FTC. (*Mutual Assurance Society of Alabama* v. *Federal Trade Commission* Civil Action No. CV82-PT-1300-S.) We would stress that at this time the Commission is only gathering facts with which to determine whether further proceedings are warrented, and has not in any way determined that a violation of the law has occurred.

In 1981, facts come to the attention of the Commission's staff that led them to investigate whether the Mutual Assurance Society of Alabama ("Mutual") and the Medical Association of the State of Alabama ("Medical Association") might be involved in violations of Section 5 of the Federal Trade Commission Act ("FTC Act") (15 U.S.C. 41). The Medical Association is a voluntary association of approximately 90 percent of the physicians practicing in the state of Alabama. Mutual was organized under the sponsorship of the Medical Association, with which it shares some directors in common, and is owned by the physicians it insures.

The Commission's investigation is focused on acts by Mutual and the medical Association allegedly directed at restricting the use of nurse practitioners and other nonphysician health care providers in Alabama, specifically in rural health clinics. Nurse practitioners serving in rural health clinics are specially educated to provide basic health care, including making diagnoses and prescribing treatment in simple cases under medically established protocols and supervision of physicians, and they act to increase the availability of health care in situations where there are not enough doctors to provide an adequate level of health care services. The Rural Health Clinic Services Act of 1977 encourages rural health clinics staffed by nurse practitioners by making such clinics eligible for Medicare and Medicaid reimbursement (91 Stat. 1485 (1977)). Congress enacted this provision in order to improve the availability of health care services in rural areas. H.R. Rep. No. 95-548 (Part I), 95th Cong., 1st Sess. 2-5 (1977)). The Act authorizes nurse practitioners to work without having a physician continuously present at the clinic, unless state law requires otherwise. (42 U.S.C. 1395x(aa)(2) and (3).)

As a result of the Rural Health Clinic Services act, several clinics were established in Alabama in which nurse practitioners worked without continuous on-site supervision by a physician. The nurses work under procedures and protocols established by a physician who is always available for consultation by telephone. No statute or regulation of the State of Alabama prohibits this arrangement. However, in January 1978, the Alabama State Board of Medical Examiners, which consists of the 15 directors of the Alabama Medical Association, issued a set of guidelines stating that independent diagnosis and treatment by nonphysicians, including nurse practitioners, was illegal. Two months later, the Attorney General of Alabama held that the Board of Medical Examiners' action was unauthorized because regulation of professional nursing was under the jurisdiction of the Board of Nursing, not the Board of Medical Examiners.

Nevertheless, in October 1978, the Board of Medical Examiners drafted a second set of guideline's which provided that the supervising physician, and not a nurse practitioner, must see a patient initially, make the diagnosis, and prescribe treatment. In May 1979, the Alabama Attorney General once again ruled that these guidelines were unauthorized and illegal.

Mutual's role in this controversy came to light through a position it took regarding nurse practitioners. In February 1979, after the Alabama Attorney General's first ruling invalidating the Board of Medical Examiners' restrictions on nurse practitioners, Mutual, which has members and directors in common with the Board and Medical Association, published an "advisory on its policy" in a publication of the Medical Association. The "advisory" stated that Mutual's malpractice insurance coverage would follow the policies of the Board of Medical Examiners, i.e., that it is only legal to use nurse practitioners and other nonphysician health care providers in cases where they have direct supervision. In April 1979, Mutual's Board of Directors voted to reaffirm this position in applying Mutual's insurance coverage to physicians involved in rural health clinics.

According to newspaper accounts and to other information, Mutual's "guideline" caused the temporary closing of several rural health clinics because the physicians who were insured by Mutual were concerned that Mutual's insurance coverage would no longer protect them against claims arising out of their supervision of the clinics. Some clinics intended to reopen only after they could obtain malpractice insurance from other sources. This insurance allegedly was substantially more expensive, thus increasing costs for the clinics.

We believe that these and other actions of the Medical Association, the Board of Medical Examiners, and Mutual will restrict nurse practitioners, their physician colleagues, and rural health clinics from engaging in lawful conduct. Such actions could diminish the availability of low-cost health care in Alabama, and is in direct conflict with congressional purposes behind the Rural Health Clinics Act. Anticompetitive conduct in the marketplace should always be eliminated in order to preserve a free and open marketplace. To prevent the poor and underserved populations from receiving the only available health care services, however, is even more repugnant and inexcusable, and clearly should be an area which should be vigorously pursued by a federal law enforcement area. The Congress must not allow such conduct to be insulated from the law. The antitrust laws of the State of Alabama are not applicable to the services of professionals, resulting in an even greater need for authority at the federal level. In no instance is this need more evident than in the above example.

CONCLUSION

Although data exists to prove the cost-effectiveness and positive outcomes of services provided by professional nurses, various obstacles have been erected to their practices with apparent success. Both nurses and their patients need the FTC to help remedy these offensive and anti-competitive actions. Without question, there is significant demand by consumers for nursing services, yet nurses have been restrained from providing such services. According to a survey regarding the price of health, the March 29, 1982, New York Times reported that nearly six out of every ten persons questioned said they would be willing to have routine illness treated by nurse practitioners or physician assistants rather than doctors. The public desires the option of nursing services far more than the health care establishment cares to admit. Unfortunately, they are often denied the opportunity to choose an alternate provider by those who know that to allow such a choice would inexorably result in increased competition.

During the last session of Congress, we supported a compromise amendment sponsored by Congressmen Dingell, Broyhill, Florio, and Lent in the House. We believe this was a fair and reasonable approach to the professions issue, and we continue to support its basic premise. We urge the Committee not to go beyond this delicately balanced amendment, and to avoid any alleged "compromise" which is, in fact, very close to a complete exemption for professionals. In particular, we are opposed to any introduction of "quality of care" or other social values into antitrust analysis, which we believe could become so burdensome in the courts that the antitrust laws would become radically weakened. Any alternatives must be carefully scrutinized to discern their true impact on the Commission's jurisdiction.

The American Nurses' Association believes that FTC activities in the health care market can serve to promote consumer choice, remove restraints which impede alternative health care delivery systems, and help to stem rising health care costs. Removal of FTC authority over the professions will protect those involved in anticompetitive practices from provisions of federal law, and will encourage the maintenance of artifically high fees for needed services. Many powerful interests would like to be protected from real competition, and free of the kind of honest scrutiny practiced by the FTC. The FTC has a critical role to play in addressing current problems in the health care market, and we urge Congress not to restrict its authority in this area.

We appreciate this opportunity to present our views on this vitally important issue.

The CHAIRMAN. Thank you.

Mr. Hacking?

Mr. HACKING. Thank you, Mr. Chairman.

I am the assistant legislative Counsel for the American Association of Retired Persons, an organization which has a membership now well in excess of 14,300,000 persons aged 55 and older. With your permission, I would submit the association's statement for the record and summarize.

The CHAIRMAN. All of the witnesses' statements will appear in full in the record.

Mr. HACKING. ARP very strongly supports the Federal Trade Commission's efforts to prevent restraint of trade and anticompetitive practices on the part of professionals. It is our belief that competition is an important means of keeping down rapidly escalating health care costs and that the FTC's efforts to curb such anticompetitive practices as price-fixing, boycotts and restraints of trade have directly served the interest of elderly consumers.

Since the rate of increase in prices for health care services remains excessively high—about three times the general inflation rate—the need for the FTC to insure fair and open competition among members of the health profession has never been greater.

In addition, we feel the FTC's activities have been consistent with the congressional and administration goals of promoting competition, reducing inflation and eliminating unnecessarily burdensome regulation. We therefore wish to see the professions remain firmly under the jurisdiction of the FTC.

It is our belief that any legislation that would totally remove the professions, or professional groups, from FTC jurisdiction would not be in the public interest. Such an exemption would simply suggest that certain persons are above the law, or beyond the rules by which all of the members of our society are governed.

While AARP would prefer that the FTC's jurisdiction over the professions remain intact, we wish to acknowledge our support for Senator Rudman's efforts last year. I also wish to acknowledge our support of the bipartisan compromise agreement that appeared in the House last session as the Dingell/Broyhill/Florio/Lent substitute.

Both were reasonable and responsible compromises which would have left quality of care issues to the States while retaining FTC jurisdiction over the purely commercial aspects of professional business practice.

We share the concerns voiced by several of the FTC Commissioners in their testimony before this committee yesterday when they cautioned the committee to beware of any spurious compromises that are circulating around the Congress, masquerading as responsible resolutions of this issue.

It is our fear that these so-called compromises might well effectively grant to the professions total immunity from FTC jurisdiction.

While our major area of concern in addressing this committee today rests upon the professions issue, we have also been asked by the committee staff to comment on the FTC's funeral rule, which is currently pending before the Congress on a legislative veto review.

I would indicate that AARP has long supported the funeral rule. It is our belief that this rule is a good one and should not be vetoed. The rule reflects some 10 years of investigation and study. It has evolved from very thorough staff work and a voluminous, balanced hearing record. Its primary objective is to provide disclosure of basic information crucial to making an informed consumer purchase.

The cornerstone of the funeral rule is its provision for basic price itemization. Price itemization will provide consumers who have to make funeral arrangements with timely access to all relevant information. Consumers will then be in a more equal bargaining position and therefore better able to select the funeral arrangements which specifically meet their particular wants and their financial needs.

The FTC funeral rule reserves the right of choice for consumers. It is our hope that you will support the rule.

This concludes my remarks, Mr. Chairman. I thank you for having had this opportunity to present them.

[The statement follows:]

STATEMENT OF JAMES HACKING, ASSISTANT LEGISLATIVE COUNSEL, AMERICAN ASSOCIATION OF RETIRED PERSONS

INTRODUCTION

As an organization representing the collective interests of over 14 million older Americans, we have an ongoing interest in activities which seek to protect the purchasing power of older persons. Given the fragility of the elderly's position in the marketplace, the Association has strongly supported the Federal Trade Commission in its efforts to protect consumers from unfair methods of competition and unfair or deceptive trade practices which serve to fuel the fires of inflation. Given their relatively fixed and limited income and the impact that high rate inflation is having on the purchasing power which that income represents, the elderly tend to be hurt the most by unfair, anti-competitive, cost and price promoting practices. In addition, older persons tend to be more vulnerable to and less able to afford the financial hardship of fraud, unfairness and deception in the marketplace.

At issue, at the present time, are several proposals which we feel would seriously undermine the effectiveness of the FTC. These include the following: (1) proposed exclusion of the professions from FTC authority; (2) proposed alteration of the current law of deception, (3) an attempt to statutorily define unfairness, and (4) reauthorization funding levels and the importance of providing adequate staff for the regional offices.

I. THE PROFESSIONS

A. The association's position

The Association has long supported the FTC in its efforts to police restraint of trade by professionals. It is our belief that competition is an important means of keeping down rapidly escalating costs of health care, and that the FTC's efforts to curb such anti-competitive practices as price fixing and boycotts have directly served the interests of elderly consumers. In addition, we feel the FTC's activities have been consistent with the Congressional and Administration goals of promoting competition, reducing inflation, and eliminating unnecessarily burdensome regulation. We, therefore, wish to see the professions remain under the jurisdiction of the FTC.

We strongly feel that any effort to remove the professions from FTC jurisdiction is not in the public interest. Such a special exemption simply suggests that certain persons are beyond the rules by which other members of our society are governed.

B. The FTC's position

All of the sitting members of the FTC oppose a special exemption for the professions. Chairman Miller, speaking on behalf of the Commission, has stated:

"I see no basis of principle upon which one or another industry can argue that its anti-competitive, unfair, or deceptive conduct is entitled to special exemption from the law . . . I don't believe the FTC can effectively accomplish its mission if such a significant sector of our economy is, by definition in law, immunized, sanctified, and set aside as a privileged class."

Therefore, the FTC is strongly and unalterably opposed to any amendment to exempt professionals from FTC enforcement of the antitrust and consumer protection laws of this country. We commend them for this strong stance.

The FTC sums up its activities with regard to the professions as follows:

"The Federal Trade Commission has, over the last several years, examined certain practices of professionals and their organizations. Our activities do not derive from any desire to regulate the professions but rather from a basic concern that some restrictions on competition among professionals increase consumer costs without producing countervailing benefits. Our objective, in both our competition and our consumer protection activities, is to enhance the ability of informed consumers to act as ultimate regulators of the market.

"Professional services are an increasingly important sector of the economy, and the efficiency of this industry is of prime importance to consumers. The service sector has been the most rapdily growing component of the economy for many years. (Health care, the major focus of recent Commission interest, is the largest single component of the service sector. In 1980 alone, Americans spent over $247 billion on health care services or 9.4 percent of the Gross National Product.)

"In light of these facts, the Commission believes that effective consumer protection and the fostering of competition cannot exclude professional services. The Commission's activities in this area have not sought to interfere either with legitimate self-regulation or with the authority of the states to assure the quality of services to their citizens. Instead, the record shows that the Commission has concerned itself only with specific barriers to competition and restrictions that demonstrably harm consumers."

C. Dingell/Broyhill/Florio/Lent substitute as the bottom line

While AARP would prefer that the Federal Trade Commission's jurisdiction over the professions remain intact, we wish to acknowledge our support of the bi-partisan compromise package that was represented in the Dingell/Broyhill/Florio/Lent substitute during the last Congress. It was a very reasonable compromise in its responsible approach, leaving quality-of-care issues to the states, while retaining FTC jurisdiction over the purely commercial aspects of conducting business. It is our hope that if this Committee should attempt to revise the FTC's current authority over the professions, that it accept the compromise language of the Dingell/Broyhill/Florio/Lent substitute.

We share the concern voiced by Commissioner Pertschuk in his testimony before the House Subcommittee on Commerce, Transportation and Tourism on March 8, 1983, when he cautioned the Committee to beware of any "spurious 'compromises' (that) will circulate around the Congress, masquerading as a responsible resolution of this issue."

We too feel that a few twists and turns of language will promise a so-called compromise that actually will effectively immunize much professional activity from appropriate scrutiny.

We, therefore, urge the Committee to reiterate its support of the language of H.R. 6995 and to view the language of H.R. 6995 as the bottom line should it decide to alter the FTC's jurisdiction over the professions.

D. FTC and the Professions

(1) Antitrust Cases

FTC antitrust cases have involved activities of three general types:

1. Alleged agreements to restrict the flow of truthful information about professional services.
2. Alleged agreements to impede market entry by innovative forms of practice, such as salaried physicians or prepaid medical plans.
3. Alleged agreements to prevent, by organized boycotts, insurers' use of cost containment programs.

These cases date back 39 years to 1943 when the Supreme Court affirmed the American Medical Association's conviction for violating the Sherman Act. Throughout this history, FTC antitrust cases have been directed at illegal private conduct and have challenged private agreements which eliminate competition in the business and financial aspects of professional practice. It has never challenged state regulation of professions. Nor, has it sought to stop legitimate self-regulatory activities of professional groups.

FTC antitrust cases have challenged the following types of conduct:

Doctors' agreement to boycott Medicaid patients in order to coerce Michigan Medicaid agency to increase fees paid to doctors.

Illegal threats by a small town's only doctors to boycott the local hospital's emergency room patients if the hospital persisted in plans to recruit a new physician competitor to practice at the hospital.

Ethics prohibition on physicians working below "usual" rates or for "inadequate" compensation used by American Medical Association in attempt to fix price levels and prevent hospital and health maintenance organizations from reducing costs by hiring salaried physicians and passing savings on to consumers.

Conspiracies in Pennsylvania, Washington, and other states to boycott physicians who work on a salary for innovative, low-cost health maintenance organizations, by excluding these doctors from hospitals, participation in Blue Shield, local medical associations, and malpractice insurance coverage.

Sweeping advertising and customer solicitation bans denying consumers access to truthful information on medical and dental prices and services, used by professional associations to, for example, block a church organization from operating and publicizing a low-cost cardiac stress clinic, to help drive a physician house-call service in Kansas out of business, to stop a physician specialist from offering an industrial medicine program to corporations for their workers, and to prevent senior citizens from learning which doctors receive Medicare payments.

Conspiracy by doctors to obstruct a union- and employer-developed cost-containment program for auto industry workers and force fee level increases by collectively refusing to participate in a state Blue Cross-Blue Shield plan.

Unlawful prohibition by American Medical Association on physicians forming business partnerships or income-sharing arrangements with licensed non-physician professionals, such as clinical psychologists.

Conspiracy of dentists to refuse cooperation with dental insurance plans' cost-containment programs.

(2) FTC actions have stopped fraudulent behavior by professionals.

For example, the FTC has challenged:

Undisclosed health risks involved in a doctor's synthetic hair implant business.

Deceptive advertising by a weight clinic that used a prescription drug never approved by the FDA as safe and effective for treatment of obesity.

(3) the FTC has proceeded cautiously in examining whether and when professional regulation imposes substantial costs on consumers without providing any countervailing benefits.

Studies show that some restrictions on the business aspects of professional practice do not increase quality but do increase prices, restrict choices, and reduce availability of professional goods and services. For example:

Higher prescription drug prices resulted from state laws restricting price advertising. A 1975 study estimated that these regulations cost consumers $134 million in one year.

Higher prices for eyeglasses exist in states with regulations strictly limiting competition among optometrists. A 1975 study estimated that these regulations increased eyglasses prices by 34 percent.

More expensive optometric services, as well as higher priced eyeglasses, result from regulations preventing certain business practices. A 1979 FTC study found some regulations increased prices by 17 percent without increasing the quality of care.

Needed services are not obtained when prices increase. Studies of optometry, denistry, and law show that higher prices mean that consumers do not obtain necessary services.

It should be noted that FTC studies on the effects of regulations have been designed and conducted with the assistance of members of the affected professions. In addition, the Eyeglasses Rule is the one rule the FTC has issued that directly addressed restrictions on competitive behavior of professionals.

Since all of the aforementioned FTC activities with regard to professionals involve health-related issues, we, naturally, continue to support the efforts of the FTC in this area. It is our belief that these activities have helped to keep down the rising costs of health care by promoting competition. Therefore, we strongly oppose the elimination of professionals from FTC jurisdiction.

II. DECEPTION

A. In general

Under current law, any advertisement can be found deceptive "if it has a tendency or capacity to deceive." It is our position that the current definition of deception should remain intact.

Chairman Miller proposes to change this definition by requiring the FTC to establish certain items before a case based on deception could be brought. His requirements are as follows: (1) significant measurable injury to consumers not outweighed by any consumer benefit; (2) a determination that the misleading statements or representations were factual claims and not opinion; (3) a finding that the advertising had a propensity or the capacity to deceive consumers generally, proving that a "reasonable consumer" would have been misled by the advertising. With regard to vulnerable groups, such as the aged, Chairman Miller proposes that (4) FTC protection could only be accomplished by focusing on whether the perpetrator knew, or should have known, that the act or practice was deceptive, regardless of whether or not reasonable consumers were deceived.

Chairman Miller's attempt to alter the meaning of deception has drawn considerable criticism, especially from other members of the FTC. Commissioner Michael Pertschuk states that "it is not surprising that the law of deceptive advertising has evolved slowly and painstakingly through generations of Commission decisions, subject to the intense and careful scrutiny by the Appellate Courts including the Supreme Court. I believe that most legal scholars would affirm that today the law of deception is relatively well settled and provides solid guideposts for those practitioners who wish to remain in compliance with legal and ethical standards."

Commissioner Patricia Bailey states: "It is no trivial matter to alter 44 years of jurisprudence. If the prohibition on deceptive practices is altered, no matter how benign the intentions of those making the change, the natural assumption of the legal community, including state and federal judges, will be that Congress must have intended somehow to change the actual effect of the law. The inevitable result will be that at least some deceptive practices which are now illegal under current law will become legal, as judges and lawyers are cast adrift from precedent to search for the new law's meaning."

Pertschuk goes on to state that "although it may theoretically be possible to develop a case under Miller's guidelines, it may be as a practical matter impossible to bring. For the expense of developing the evidence Miller wants—especially at the time when we have limited resources—will be prohibitive."

Under Chairman Miller's proposal, it is uncertain whether several FTC cases could have been brought. One is a case involving Anacin's claim that promoted their product as the best pain reliever on the market because it contained an ingredient "most recommended by doctors" for curing minor aches and ailments. The

FTC investigated and found the ingredient to be plain aspirin. As a result, if found the ads misleading and deceptive and ordered the campaign halted.

Applying the new Miller criteria to the *Anacin* case, before the FTC could file suit, it would have to determine that consumers bought the product only because of the ad and that they were adversely affected by their decision—paying substantially more than they would have if they had bought regular aspirin.

Another case which possibly could not be brought under Chairman Miller's proposal is one where the FTC ordered the makers of Fresh Horizons bread to change its advertisements that promoted the bread for its high fiber content. The FTC discovered that what Fresh Horizons failed to mention was that the fiber was not grain fiber contained in most breads, but wood pulp derived from the pulp of trees. The Commission found this omission was misleading and deceptive.

In the *Fresh Horizons* case, under the new Miller criteria, it would be nearly impossible for the FTC to prove that consumers were harmed by the omission that the fiber was made of wood pulp, because there is no evidence that wood fiber is worse than grain fiber. But even though there may be no physical harm attached, doesn't the public have a right to know what it is purchasing? Doesn't the fact that a particular bread is made from trees instead of from natural grains play a substantial part in the selection process? Aren't there some things consumers need to know about the products they are buying even though the products may not kill them?

The Association believes that the well established law of deception should be left as it currently stands and that no additions to or deletions from it should be made.

The following is a discussion of each of the elements of deception as proposed by Chairman Miller.

B. Materiality/cost benefit proposal

Chairman Miller proposes that before a case could be brough by the FTC, there must be demonstrated significant measurable injury to consumers, not outweighed by any consumer benefit. The primary purpose of such a definition is to overrule the current definition of deception since it alters the burden of proof necessary to establish that an act or practice is deceptive. In addition, it opens new vistas for litigation over the proper definition of "significant measurable injury" or "benefit," and the quantum of proof and acceptable methodologies for establishing values for these new terms. The proposal similarly obscures the precise calculus for determining whether injury is indeed outweighed by costs.

It is our belief that if the cost benefit proposal were enacted, both government and business will expend much time and effort ascertaining the ratio of costs to benefits of a questioned practice. Whatever the result, it is hard to immagine that the investigation and litigation process will be less burdensome with these added features than under present law.

We are less concerned about the size of the injury, and far more concerned about basic fairness. We think it is ridiculous to stop to total up a balance sheet, weighing consumers' losses against business' gains when citizens are being cheated, misled, manipulated and shortchanged.

Under Chairman Miller's proposal, in addition to requiring the Commission to measure the dollar cost of misleading statements, he would have the Commission look only at economic injury to consumers. His proposal, however, does not take into consideration such things as consumer expectations (to be able to rely upon advertisers' representations) and competitors' losses (an advertiser's competitor may be harmed in the millions of dollars, while the consumer may suffer the loss of a couple of dollars).

Chairman Miller cites as an example of a case that could not be brought using the cost-benefit proposal—the 1977 *Poligrip* case. There, the makers of Poligrip falsely claimed that the denture adhesive helps denture wearers eat foods such as apples without discomfort or embarrassment. Miller states that "this product is cheap, frequently purchased and easy for consumers to evaluate for themselves." As a result, Miller concludes "the FTC is not needed to police the marketplace" in this type of case because consumers will be able to find the deception easily on their own—and with relatively little effect on their pocketbooks.

We disagree. Even though the economic harm to one individual may be relatively small, think of the embarrassment that may have been caused to a grandfather who, at a Sunday church picnic, bit into an apple only to find his teeth drop to the ground when he removed the apple from his mouth. In addition, what Chairman Miller hopes to measure is singlular economic harm. What of collective economic harm as a result of the thousands who may have purchased the item as a result of the advertisement? Would not this have a profound economic impact upon Poligrip's competitors who suffered a loss as a result of the deceptive claim? In addition, should not a 75-year old widow be able to rely upon the representations of an advertiser who is making a sales pitch directed at her?

In *FTC* v. *Colgate-Palmolive Co.* the Supreme Court confirmed that for an advertisement to be deceptive, the Commission must find that it will be a material factor in a consumer's decision to purchase a product. However, the Court noted that the Commission need not survey the public to support such a finding, but may infer materiality from all the evidence. We believe that a requirement of actual proof of injury beyond that already required is burdensome, impractical, and unnecessary.

C. Fact v. opinion proposal

Under the Miller proposal, the FTC would have to make a determination that the misleading statements or representations were factual claims and not opinions. We strongly object to this. We firmly believe that the proper approach is to look to the effect that a particular representation has upon consumers rather than trying to delineate between fact and opinion.

Our position is predicated upon the premise that in a great number of consumer transactions, the consumers and sellers do not stand on equal footing as to available information. As a result of this "informational imbalance" between consumers and business, consumers are oftentimes prone to believe the representations of the salesperson.

As an example, consider an opinion as to the performance capabilities of a washing machine made by a salesman of 20 years to a grandmother who does washing for 14 grandchildren and has never before purchased a washing machine. Since the salesman obviously knows what he is talking about, the elderly lady is not dealing at an arm's-length transaction with the salesman but must rely upon his representations and opinions, as a result of his longtime experience in the field, as to the capabilities of the machine.

Commissioner Pertschuk voices his criticism of the fact-versus-opinion proposal as follows:

"I know of no case that the Commission has brought challenging opinions except for those cases in which the Commission has alleged that opinions such as those of scientific experts were designed to lead consumers to believe that the opinion was backed by expert knowledge and experience. If Dr. Michael DeBakey, the famed heart surgeon, were to appear in a cigarette ad claiming that in his measured opinion as a surgeon it was his judgment a particular cigarette cured cancer, Miller's amendment would appear to place such opinion testimony beyond the reach of the Commission's policing powers. I simply disagree that there is any sound public policy advanced by doing so."

We also anticipate that the enactment of a fact-versus-opinion proposal would result in a great deal of litigation centering around the question of when opinion becomes a representation of fact. We feel the preferred approach is to leave the definition of deception as it currently is.

D. Reasonableness proposal

Chairman Miller's proposal requires a finding that the advertising had a propensity or the capacity to deceive consumers generally, proving that a "reasonable consumer" would have been mislead by the advertising. We find this proposal unacceptable for a number of reasons.

The primary problem with the reasonable consumer standard espoused by Chairman Miller is that there is none. Predictably it would require years and countless hours of case by case adjudication to define standards of reasonableness, as well as acceptable methodologies of proof. How do you define "reasonableness." Would what's reasonable to a consumer in New England be reasonable to a consumer in Texas? Would reasonableness of consumer conduct be determined for the class of consumers injured by a practice as a whole, or would the law differentiate in degree among various consumers depending on the complexity or sophistication of the product or marketing scheme in relation to the age, intelligence, and prior purchasing experience of the individual consumers in the class?

Foreseeable are clashes of expert psychologists and other behavioral scientists over the arcane question of whether consumers—who might, in a weak moment, be taken in by the deception—should have known better. Chairman Miller's proposal would also impose a new and difficult element of proof which would often shift the focus of litigation from the deceptive act or practice of the business to the conduct of the consumer.

Under longstanding interpretations, a practice is deceptive if it has the capacity to deceive any substantial or appreciable segment of the public. Thus, the FTC and the courts have created a uniform minimum standard of conduct which properly encompasses all likely targets of a marketing effort by a particular business.

This current approach we feel is more acceptable than creating a reasonableness standard.

E. Special protection for special groups proposal

With regard to vulnerable groups, such as the aged, the poor, the uneducated, Chairman Miller proposes that FTC protection could only be accomplished by focusing on whether the perpetrator knew the act or practice was deceptive, regardless of whether or not reasonable consumers where deceived. Average consumers who act reasonably are apparently protected regardless of whether the business knew of the likely deceptive effect of its marketing. Vulnerable consumers who act in an unreasonable or gullible manner, on the other hand, are protected only if the merchant knew or should have known of the effect of the practice. Therefore, ads aimed at the elderly that promote cures for cancer could be attacked under this proposal. While we appreciate Chairman Miller's attempt to provide special protection for special groups, we object to this basic premise—his deception criteria—that brought him to the special protection proposal.

In the first place, this proposal is another one which alters the current burden of proof. Using this proposal, if would be far more difficult for the elderly to bring cases since they would have to prove intent.

In addition, a mens rea requirement has never been an element of deception under Section 5, and appropriately not. The FTC Act is not a criminal statute. It does not punish the sinner, it simply seeks to protect the consumer. Intent is irrelevant to whether consumers may be injured and, consequently, to whether a company should be ordered to cease and desist from deceiving the public. Moreover, intent is enromously difficult to prove. Therefore, while Miller's proposal purports to provide special protection for vulnerable groups, the impact of this proposal would leave such groups far more vulnerable to exploitation than under present law.

Again, it would take years of litigation to restore any semblance of stability or predictability to the law, as the FTC and the courts seek coherent definitions of reasonableness, vulnerability, and knowledge. More importantly, these proposals are designed to substantially reduce the standards of acceptable business conduct. If Chairman Miller's proposal is adopted, the elderly, the sick, handicapped, the uneducated, and other regular targets of deceptive practices will suffer their economic losses in face of defenses of good faith, or lack of intent or knowledge.

III. UNFAIRNESS

A. In general

Section 5 of the FTC Act authorizes the FTC to police "unfair acts or practices affecting commerce." This authority, which has remained relatively unchanged during the past 68 years, was originally granted to the Commission in the FTC Act of 1914.

Chairman Miller, and others, now contend that a departure from this well established precedent is in order, and that the Congress should statutorily define unfairness. Miller proposes the following unfairness definition: (1) the consumer injury should be substantial; (2) the injury from the alleged unfair act or practice should outweigh its benefits; and (3) the harm must be one which consumers could not reasonably have avoided. This definition derives from a 1980 Statement of Policy by the FTC.

What Chairman Miller is proposing—a statutory definition of unfairness—was flatly rejected by the Congress when it created the FTC in 1914. Then, the Congress gave considerable thought to whether a specific list of practices should be proscribed. It was decided that a broad statutory standard should be adopted and that the definition of unfair practices was best left to gradual development by the FTC, subject to review by the Courts.

The Association agrees with the Congress of 1914 and strongly opposes any attempt to statutorily define unfairness. We feel the FTC should be able to apply its unfairness standard just as other agencies carry out their broadly-phrased mandates. In addition, we feel that such broad legal authority is necessary in order for the FTC to be able to respond quickly and flexibly to the changing needs of the marketplace. Why hamstring the FTC with a statutory definition of unfairness so it would be unable to deal with constant change?

At the heart of our argument rests our belief that unfairness is not something that lends itself to a precise, statutory standard. How do you legislate good sense?

Since unfairness is one of those "beauty in the eye of the beholder" situations, which beholder do you turn to in order to define what is fair?

We contend that any attempt to define unfairness would be an endless task. This is true because any definition of unfairness that is complete today would be incomplete at the time of enactment into law. And, if complete at the time of enactment, it would soon be outdated through the ingeniousness of the unscrupulous businessman. Therefore, if any definition of unfairness is attempted, the continual burden will be placed upon the Congress to define and redefine, again and again, the concept of unfairness.

In addition, any attempt at a definition would result in endless litigation as to the meaning of each word. It will take virtually years of litigation and subsequent judicial interpretation to ascertain with any degree of certainty exactly what such definition might mean. And, before such certainty could be legally established, think of the resulting uncertainty in judicial proceedings across the nation as to how such standard is to be applied.

The Commission's unfairness authority has proved time and time again an important safety valve for the predatory overreaching of sellers that does not fit neatly within the confines of deception. We feel that to define unfairness or to remove the authority altogether would force the concept of deception beyond its limits in an effort to include fairness.

Through case-by-case adjudications, settlements with individual companies, and the promulgation of trade regulation rules, the FTC has over the years used its unfairness authority to stop a variety of specific commercial practices that do not fit easily within traditional theories of deception.

Over the course of the last eight years, we have worked closely with the FTC in several areas which impact heavily on older Americans. Largely, these efforts were aimed at securing disclosure of full and accurate information in the industries affected to allow consumers to make wise decisions about competing goods and services. While the FTC has several tools at its disposal to insure fair competition, the areas in which we were primarily involved dealt with the issuance of trade regulation rules.

IV. THE PROPOSED EXEMPTION OF ADVERTISERS FROM FTC UNFAIRNESS AUTHORITY

The advertisers propose an exemption for themselves from the unfairness authority of the FTC, even if that standard is defined in statutory language. Such a move was strongly resisted by this Committee in the past. We commend the Committee for this strong stance and urge you to not create a special exemption from the FTC's unfairness authority for the advertising industry.

If such a proposal were approved, we believe that advertisers could depict dangerous conduct, such as reckless use of electrical appliances, bicycles, or gas stoves, in an advertisement directed to children, who might imitate the unsafe behavior. Such advertisements could not be stopped on a deception theory, but rather are based on unfairness alone.

Ad substantiation cases could be tried only on a deceptive theory (assuming the FTC's deception authority is not weakened). This would make enforcement of substantiation requirements much more difficult, if not impossible. In each case the Commission would have to prove that the ad created a deceptive impression that a "reasonable basis" existed for the claims made.

Advertisers could not be required to disclose information essential to a rational purchase or to proper use or care of a product, unless it is shown that the failure to disclose is somehow deception (again, this assumes no weakening changes in the FTC's deception authority). Using an unfairness theory, the Commission has required, for example, disclosure in advertising of the effectiveness, or R-Value, of home insulation, the health hazards of smoking cigarettes, and the availability of extended warranty and service programs for product defects.

Advertisers would be free to use advertising techniques that are not a bona fide effort to sell the advertised technique. Using "bait and switch" techniques, salespersons could disparage the advertised product and "switch" the consumer, once he is in the store, to a more expensive item.

Advertisers would be free to direct specially tailored claims to vulnerable individuals—adults as well as children—who are incapable of exercising rational judgment with respect to the claims made (e.g., liquor ads somehow being targeted to heavy drinkers and smokers).

Advertisers would not be required to disclose inherent health or safety risks associated with normal use of the product advertised, unless the failure to disclose is also deceptive.

One of the major shortcomings of this attempt to exempt commercial advertisers from FTC unfairness jurisdiction is one of interpretation. What exactly constitutes "commercial speech"? Where would the line be drawn to distinguish between what is said in a commercial setting that would qualify for the exemption and that which would not qualify? Or would anything and everything that is said in a commercial setting qualify for the exemption? Just how far does the term "advertising" extend? Does it include packaging and other point-of-sale material? Does it include presentations in land sales offices? It appears from the language of the proposed exemption that virtually any form of interchange between seller and consumer would be exempt.

The Association believes that commercial advertisers were initially placed under the FTC's unfairness authority in an attempt to protect consumers from unscrupulous advertising. We see no reason to create a special exemption for advertisers at this time.

V. AUTHORIZATION LEVELS AND THE NEED TO MAINTAIN ALL FTC REGIONAL OFFICES WITH ADEQUATE STAFF

A. Funding levels

It is the Association's hope that this Committee in its reauthorization bill will provide adequate authorization levels to keep all of the FTC regional offices open and adequately staffed. Our belief is that sufficient funds must be available to the FTC in order to adequately staff all of the FTC's current regional offices. In addition to providing adequate levels of funding, we ask the Committee to formally instruct the FTC, in the reauthorization bill, to keep all of the current regional offices open and to adequately staff them.

B. The need for the regional offices

It is our position that the regional offices have been instrumental with regard to the rulemaking functions of the FTC that have benefited the elderly (*i.e.*, the Eyeglasses Rule and the Proposed Funeral Rule). In addition, the regional offices have also been instrumental in the bringing of FTC cases (i.e., land sale fraud cases in which elderly persons were involved).

We believe the regional offices are perhaps the most important "outreach arm" the FTC has for plugging itself into the regional networks, which include the nation's elderly. Therefore, we strongly oppose any effort to close any FTC regional office.

C. Geographical constraints

One of the primary problems with fewer FTC regional offices involves geographical constraints, since these offices, which would represent larger geographical areas, would be far less accessible than the current ten FTC regional offices.

As stated earlier, the Association strongly believes that the FTC regional offices are perhaps the most important "outreach arm" the FTC has for plugging itself into the regional networks. These regional networks include large numbers of elderly persons who may well be unable to travel the extended distances to the relocated regional offices.

While "ten" represents no magical amount, we feel this number of offices has been an acceptable minimal number in affording individual access to the FTC at the regional level. Any reduction below the level of 10 offices, we feel, would seriously undermine the effectiveness the FTC has achieved via its current regional structure.

CONCLUSION

In closing, we would like to reiterate our positions on the major issues facing the FTC at the present time. They are: (1) the professions should not be exempted from FTC authority; (2) the law of deception, as it currently exists, should remain intact and should not, in any way, be altered; (3) the FTC should retain its unfairness authority without a statutory definition; (4) advertisers should not be exempted from the FTC's unfairness authority; (5) adequate funding levels should be provided with instructions to the FTC that all regional offices are to remain open and adequately staffed.

The FTC has been very instrumental in protecting the interests of the elderly in numerous ways. If the aforementioned suggestions are followed, we feel the FTC will be able to continue to protect the rights of the elderly in the future.

The CHAIRMAN. Thank you, Mr. Hacking.

Dr. Sullins, in your statement you talk about—and I am quoting—"circumstances and considerations involving eye care that vary from State to State."

What great variance is there in eye care?

Dr. SULLINS. Perhaps, Mr. Chairman, probably the most glowing example of that would be the recent promulgated rule in the past 8½ to 9 years relative to what optometrists can or cannot do relative to diagnostic pharmaceutical agents.

I think this is probably the most glowing example that would be under the quality of care or scope of practice issue that would concern us.

The CHAIRMAN. You did not mean in your statement, I presume, that the circumstances of eye care, vary between Colorado and Alabama or New York and Florida?

Dr. SULLINS. I think the argument could be made—and it depends upon who you talk to—there is a philosophical camp in optometry that believes there is no need for pharmaceutical agents, which I think is fast dying off. I think this strikes at the gut issue of what we're trying to impress upon the committee and its deliberations concerning the FTC. It might well be a fact, and more easily addressed and more direct to its citizenry if addressed at the State level.

For example, the State of Colorado cannot use drugs to dilate the human pupil and look at the peripheral retina. Many diseases and things that would cause limited vision, blindness and perhaps even death can be much easier determined and more properly evaluated with these pharmaceutical agents at our disposal—for example, like in the State of Tennessee, of which I am a native.

The CHAIRMAN. What protection comes, Dr. Sullins, to the public if you say that optometrists cannot advertise, or that they cannot practice in a commercial building?

Dr. SULLINS. I think the point of advertising, perhaps, Mr. Chairman, is a moot point at this time, since the decision of *Bates* v. *State Bar of Arizona.*

The CHAIRMAN. It is a moot point. I understand that.

Dr. SULLINS. Yes, sir.

The CHAIRMAN. It is the question I put to Dr. Boyle. Again, I am a lawyer, and my profession is, in my mind, as bad as most other longstanding professions. We opposed advertising—I understand it is a moot point——

Dr. SULLINS. Yes, sir.

The CHAIRMAN [continuing]. It is the inbred nature of all professions, it seems to me, to resist change.

Dr. SULLINS. Yes, sir.

The CHAIRMAN. And especially if suggested from outside the profession. It is almost like the family can fight among itself, but let anybody outside the family attack them and they all draw together.

I will phrase my question broader. Why are all professions like this? Why are we so afraid of outside suggestions and why do we cloak our defense in "it's going to interfere with the public quality of care"? Why do we not really say that we just do not like outsiders interfering on our turf?

Dr. SULLINS. I think that would be a remark that some people might make. I think your resistance to change is normal, as you have so eloquently put it. Now people have become accustomed to advertising. I think the trends that started in advertising originally were more inflamed, and now that advertising has become sophisticated I think there has probably been a difference between the example you make of the Spanish-speaking advertisement as opposed to the other things. But I think this is something that we are willing to live with. We have members of our association who are, in fact, involved in that, and that is just the law of the land.

The CHAIRMAN. Mr. Bentley, are you familiar with the ballot issue we had several years ago about denturists?

Dr. BENTLEY. Yes, sir.

The CHAIRMAN. Has any harm come to the public by the passage of that measure?

Dr. BENTLEY. Not any case of record that I am able to recall.

The CHAIRMAN. I would think more local politicians would pick up that issue.

In Oregon, dentists wanted dentures issued only by dentists. Finally, a group of citizens initiated a ballot issue to provide that you did not have to go straight to a dentist to get dentures—because prices were too high, they thought. It was strongly fought, heavily financed in opposition but, in any event, it passed overwhelmingly.

Again, I am curious. Why the strong opposition from dentists?

Dr. BENTLEY. Because we believe there is an inherent danger to treating the body without adequate experience and adequate training to do so, and nobody has been able to prove that the denturist has that adequate training.

The CHAIRMAN. Politicians are as good as anybody I know in staying in touch with their public—or we do not come back. But I have never had a question on it. Admittedly, it would be a State legislative question, but I have not talked to any legislator since that measure was passed that has had any serious complaint from the citizens. I would think that if the denturists were not able to treat the public directly, you would start to have public complaints.

Dr. BENTLEY. The basic issue that seems to come up in the denturist issue is a matter of economics and experience has proven in the States where the denturist laws have been written that once they are legalized, there is no difference in the fee, between the professional dentist and the denturist. They ultimately seek the same level.

The CHAIRMAN. Would the dentist come down?

Dr. BENTLEY. I am not sure of that, sir.

The CHAIRMAN. I will not pursue it any further, because it is unique to Oregon, but I think you are right. Water does seek its own level, but in this case, it dropped rather than going up.

Frank?

Senator LAUTENBERG. Yes.

Before, if you were sitting in the audience, you heard me ask Dr. Boyle about his views on behalf of the American Medical Association, about the ability of other professions to provide health care. Ms. Cole, are you satisfied with your profession's access to the marketplace? If not, what do you think is the primary reason?

Ms. **Cole**. I believe that, in some instances, those nurse practitioners who are, in fact, qualified to provide service to the public have been limited and I do believe that the basic issue is the economic issue in relationship to those areas where nurse practitioners can provide services that are more economical and they then—it becomes an issue of, are they getting into medicine, are they getting into medical practice.

Even though it has been proven in most of those cases that they were, in fact practicing nursing, there is still a continued effort on the part of medicine in many States to attack Nurse Practice Acts and, to in fact, attack nurse practitioners who are trying to provide a service to the public.

I would not be able to give you specifics as to how many States that is occurring in, but we do have cases on the record.

Senator **Lautenberg**. But the general view is that there is an organized attempt—without putting words in your mouth—to limit nurses' access to the health marketplace?

Ms. **Cole**. I would have to agree with the Chair. The Chairman indicated that we have difficulty in changing in our longstanding professions. I believe among professions, those who have begun to see that nurses who are well-prepared, who can, in fact, work as colleagues with them in practice, that in fact there has been a very good relationship that has been established and that, in fact, very good quality care has been delivered to citizens within those communities where they are practicing.

So I would not say that that is the case in every situation. But I do believe that there has been some resistance on the part of medicine to allow nurses to practice in the areas that they have, that they are qualified.

Senator **Lautenberg**. Very delicately put, Ms. Cole.

Dr. Sullins, very quickly, I did not have a chance to read your testimony before. I just wanted to make sure I understood it.

You favor, I take it, limited review by the FTC. I think you subscribed to the proposal that Senator Rudman has put forward, to maintain the profession's independence in educational standard setting and such things, but to oppose any exemption from antitrust laws or rules as it has been discussed.

Dr. **Sullins**. Senator, I think you have summed it up quite ably. The only concern I might have is that I listened to Senator Rudman's remarks before getting ready to testify before this august group. I would like to have the opportunity to look at that in black and white, but it seems that in talking to the members of the American Optometric Association it is very close, but again, I would like to reserve the opportunity.

Basically, our concern is one of preemption of State laws, and I think whether you say relative to scope of practice or to quality of care is the crux of our argument from the start.

Senator **Lautenberg**. He wants, as I understood it, to have the States set their own rules there, but to make certain that no one is exempt from the antitrust provisions that control all of our conduct.

Dr. **Sullins**. In listening to his comments, yes, sir, that is my understanding at this time.

Senator **Lautenberg**. How do you feel about Mr. Hagman's views on opticians providing—eyewear, I think, is the terminology?

Dr. **Sullins**. I have a unique perspective on that. I am also an optometry officer in the Navy Marine Corps, so I not only have a private practice down in Tennessee, I also practice in the State of Georgia for the Marine Corps.

I have seen these people to be very great deliverers of opethalmic prosthetic devices. I think this is a scope of practice issue which they have to convince—to our state legislatures—as we have to convince, to increase our scope of practice. I think they are far more apt.

Having had a limited experience in government myself, I think, hopefully the more direct the representation, the better the laws would be.

Senator **Lautenberg**. Thank you, Mr. Chairman.

The **Chairman**. We are going to make it all right. We have about 10 minutes to get to the floor.

I want to ask Dr. Bentley a question. Doctor, where dentists were prohibited from advertising, was that more frequently done by State law passed by the urging of dentists, or was it simply a self-enforced, within the Dental Association, prohibition?

Dr. **Bentley**. It is my understanding that this was a self-enforced provision by the associations.

The **Chairman**. And that you had relatively few State laws per se? I should not say, "per se." That is a term of art we have been using here today.

You have had relatively few laws on the books that prohibited it?

Dr. **Bentley**. That is right, sir.

The **Chairman**. Mr. Hagman, what is your reaction again to the position of the optometrists that the States should be left alone to regulate the dispensing of eyeglasses?

Mr. **Hagman**. Mr. Chairman, I think that sounds very lovely, but things do not happen that way. If this were practical, we would have opticians licensed in all States, whereas now they are licensed in only 22 States. They are prohibited from fitting contact lenses in 6 States, and they have restrictions on fitting contact lenses in 19 States.

There are many restrictions placed on opticians by State laws because, when we get down to a practical matter—you were a State legislator, and we know the influence that medicine and optometry have in the State legislatures. They have a great deal of control on the local level. I am sure they would like to have it remain this way, but I am sure it is not in the public's best interest.

The **Chairman**. It is interesting. I know what you mean by control, but it is always the big fish and the little fish. I have been involved in some tremendous battles between the AMA and the optometrists in terms of quality of care with one of them thinking that the other should not be trespassing on their territory. It seems to go downward and downward. I do not know who is at the bottom of the pile in terms of the professions.

Let the record show someone said "barbers." Be careful of the man who holds a knife at your throat.

That is all the questions I have and we are finished in a timely fashion. We have a vote, and I have about 5 minutes to make it. Thank you very much.

[Whereupon, at 11:50 a.m., the committee adjourned, to reconvene at 9:30 a.m. on Friday, March 18, 1983.]

FEDERAL TRADE COMMISSION REAUTHORIZATION

FRIDAY, MARCH 18, 1983

U.S. SENATE,
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION,
Washington, D.C.

The committee met, pursuant to notice, at 9:30 a.m., in room SR-253, Russell Senate Office Building, Hon. Bob Packwood (chairman of the committee) presiding.

The CHAIRMAN. The committee will come to order, please. We will start with our first panel, Mr. Versfelt, Mr. Weil, Mr. Rogal, and Mr. Greenberg.

STATEMENTS OF DAVID A. VERSFELT, AMERICAN ASSOCIATION OF ADVERTISING AGENCIES; GILBERT H. WEIL, ASSOCIATION OF NATIONAL ADVERTISERS; WILLIAM W. ROGAL, AMERICAN ADVERTISING FEDERATION; AND DAVID I. GREENBERG, LEGISLATIVE DIRECTOR, CONSUMER FEDERATION OF AMERICA

The CHAIRMAN. Good morning, gentlemen.

Mr. WEIL. Good morning, Mr. Chairman.

The CHAIRMAN. Do I understand that, at least for the first three of you, that one of you is going to make the presentation on behalf of all of you?

Mr. WEIL. I shall do that, Mr. Chairman. My name is Gilbert Weil.

The CHAIRMAN. Thank you, Mr. Weil.

Mr. WEIL. At my right is Mr. Versfelt, who is representing the American Association of Advertising Agencies; and at my left, Mr. Rogal, for the American Advertising Federation.

The CHAIRMAN. Good morning.

Mr. WEIL. These three associations, Mr. Chairman, together represent the overwhelming majority of people and companies that constitute the advertising industry in America.

Our purpose in appearing here today is primarily threefold. First, to endorse and support the amendment of the Federal Trade Commission Act that was contained in section 14 of S. 2499 of the past session. That, as you will recall, prohibited censoring the content of commercial advertising on grounds of purported unfairness, whatever that might be; second, to endorse and support the amendment set forth in section 6 of that same bill, which would substantially restrain the FTC's ability to engage in backdoor rulemaking under section 5(m)(1)(B) of the act. Actually, we believe it would be still better to totally repeal that section 5(m)(1)(B). Third, we would recommend adding a specific definition of "deceptive acts or practices" to the Federal Trade Commission Act with respect to the content of commercial advertising.

Let me explain, Mr. Chairman, in the interests of meeting the time requirement for oral presentation, I have redrafted from our two-page summary so that you may not find it in the sequence you are looking at.

The CHAIRMAN. I will assure all of the witnesses, again: All of the statements are always put in the record and, because you all were good enough to supply them ahead of time, I have read them all in toto.

Mr. WEIL. Fine. I appreciate that, and we all do, Mr. Chairman.

I would just like to point out that in a nation that prides itself upon a representative form of government, it is intolerable that five people who are unelected, who have terms of office longer than those of a Congressman, a Senator, or a President, or at times even three such people, or even, to take it to extremes, two out of a quorum of three should have the power to impose as the law of the land their personal, subjective, ideological views as to what is "fair" or as to what is "deceptive" in their own eyes.

The CHAIRMAN. Let me ask you just a quick question. How does that differentiate them from the Supreme Court? The Court is unelected and sits forever, deciding what the law and the Constitution means.

Mr. WEIL. I think the major differentiation, Mr. Chairman, is that the Supreme Court is there by virtue of the Constitution.

Mr. ROGAL. If I may interject, the Supreme Court does not make law.

The CHAIRMAN. Does not make law? My hunch would be that the bulk of the witnesses who appear before this committee year in and year out would not agree with that statement.

Mr. ROGAL. That is extremely possible.

The CHAIRMAN. Excuse me. Go ahead.

Mr. WEIL. But I do think they, the Supreme Court, is a constitutionally constituted body; whereas, the Federal Trade Commission is not.

That power of these five, three, or perhaps at least theoretically possible two people, is more power than your committee has, or the Senate itself, or the House, or the President. This becomes even more egregious where the content of commercial speech is involved, because that is constitutionally protected.

We would like to thank your committee, Mr. Chairman, for its overwhelming acceptance of our position on "unfairness" in its vote last year. We can also remind you that it is also a position that the entire Congress has adopted in law time and again regarding advertising trade regulation rule proceedings.

We can see no logic for distinguishing between rulemaking and adjudication where rights guaranteed under the first amendment are concerned. While we have included proposed text for a definition of "deception" in our full presentation to your committee, we do want to stress that we are not wedded to any particular wording.

We would welcome the opportunity to work with you, your staff, or any other interested persons in reaching any articulation so long as it is faithfully expressive of the fundamental principles that we see as constitutional imperatives.

They are: That the Commission shall no longer appear to have the power to censor commercial advertisements by purporting to read into them strawman meanings that can then be knocked down as supposedly deceptive or misleading, or by attacking them for inconsequential statements that involve no real public interest—nitpicking in other words.

We appreciate the opportunity to appear before you, and we will do our best to answer any questions you might have.

[The statement follows:]

JOINT STATEMENT OF THE ASSOCIATION OF NATIONAL ADVERTISERS, THE AMERICAN ADVERTISING FEDERATION, AND THE AMERICAN ASSOCIATION OF ADVERTISING AGENCIES

This statement is repectfully submitted jointly by the Association of National Advertisers (ANA), the American Advertising Federation (AAF) and the American Association of Advertising Agencies (A.A.A.A.), national trade associations which together represent the overwhelming majority of all persons and companies that comprise the advertising industry in America. Our principal purpose in submitting this statement is to propose amendments to the Federal Trade Commission Act which will restrain future abuses by the FTC of its authority to proscribe or regulate commercial speech.

IDENTIFICATION OF THE ASSOCIATIONS

ANA is not-for-profit corporate trade association, organized and existing under the laws of the State of New York with offices at 155 East 44th Street New York, New York 10017. It is composed of approximately 400 companies, with over 2,000 subsidiaries and divisions (many of which are relatively independent advertiser entities), located throughout the United States. They manufacture and sell a wide range of products and employ advertising as an important element of their marketing and public relations programs. Although ANA's membership includes many of the nation's largest advertisers, it also includes a large number of smaller ones. Approximately one-third of ANA members spend under $5 million annually for advertising. The common characteristic of all ANA members is that they purchase space and time from the media of mass communications.

The AAF is a national trade association which includes within its membership all of the various elements of the advertising industry. Its principal office is located at 1225 Connecticut Avenue, Northwest, Washington, D.C. 20036. The membership of the AAF includes companies that manufacture and sell consumer products, advertising agencies, newspaper and magazine publishers, radio and television broadcasters and networks and approximately 22 other trade associations with memberships composed of companies engaged in various advertising pursuits. The Federation also represents the "grassroots" of the advertising industry because it is the parent body of more than 200 local advertising clubs and federations located throughout the United States and having a combined membership of approximately 25,000 advertising practitioners. These local organizations, like the parent body, include advertisers, advertising agencies and media within their membership.

The A.A.A.A. is the national association of the advertising agency business. Its more than 560 members, both large and small, are located throughout the United States and handle approximately 75 percent of all national advertising placed by advertising agencies in this country. Its address is 666 Third Avenue, New York, New York 10017 and it maintains a Washington office at 1899 L Street N.W., Washington, D.C. 20036.

INTRODUCTION

Before we propose and explain our amendments it is important that we point out some of the things we are not trying to accomplish.

We are not seeking to weaken consumer protection from injury due to false, deceptive or misleading advertisements. Nor are we seeking to reduce prompt and effective prosecution by the Federal Trade Commission in appropriate cases. Although the FTC has on occasion been overzealous in enforcing its power to enjoin "deceptive" advertising, claims or statements that constitute harmful misrepresentations cannot be countenanced in our industry under any circumstances.

We are not seeking to obtain by legislative grace a special exemption from FTC jurisdiction that applies to organizations in general. Quite to the contrary, we recommend only such amendments as would explicitly clarify congressional intent that the First Amendment, which guaranties everyone freedom from abridgement of commercial speech, shall be conscientiously observed as the Commission goes about its regulatory activities.

We are not seeking to affect in any way the FTC's power to require that positive claims made in advertisements must be substantiated by and based upon factual support in the possession of the advertiser such as would satisfy a reasonably prudent advertiser as to their truth. We believe that such positive claims as "get 14 percent better performance" or "9 out of 10 people prefer" clearly represent to the consumer that the advertiser has conducted tests or surveys or has some other basis for making the statements in good faith. That implication is false, i.e., "deceptive", if the advertiser in fact lacks such material.

Finally, we are not seeking to destroy or weaken the FTC in any way. Insofar as advertising is concerned, we believe that a national regulatory body is needed. But our industry is acutely aware that the FTC has in the recent past overstepped the boundaries of its congressional mandate, so we turn now to our specific legislative proposals to prevent a recurrence of such overstepping and to relieve advertisers, especially smaller and medium sized ones, of the chilling effect upon their freedom of speech that comes from fear of such overstepping.

ADVERTISING IS SPEECH PROTECTED BY THE FIRST AMENDMENT

Our democracy and our marketplace are grounded upon the conviction that wise decisions are most likely to be made when a broad range of information is disseminated. The First Amendment thus stands to protect the free flow of information. Communication does not take place without a receiver as well as a sender, so the right of all to speak freely implies an equal right on the part of the public to hear those who would speak. Indeed, the freedom to learn, to be fully informed on matters of interest, is as precious an inheritance as the freedom to tell.

Therefore, the guarantees of the First Amendment reach beyond the individual speaker to encompass, as well, the recipient of the communication. As the Supreme Court summarized in a case which invalidated as unconstitutional a Virginia statute prohibiting the advertising of prices of prescription drugs, "[i]f there is a right to advertise, there is a reciprocal right to receive the advertising". *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748, 757 (1976). *See Red Lion Broadcasting Company* v. *FCC,* 395 U.S. 367, 390 (1969); *Stanley* v. *Georgia,* 394 U.S. 557, 564 (1969); *Martin* v. *Struthers,* 319 U.S. 141, 149 (1943). While the persuasive aspect of commercial advertising may be of particular value to sellers of goods or services, the informational content is no less significant to consumers, whose knowledge of product availability would be restricted in the absence of advertising. The public's understanding varies with the quantity and quality of its information. As a consequence, the Supreme Court's decisions involving corporations which have undertaken to communicate with a segment of the public are appropriately based: "Not only on the role of the First Amendment in fostering individual self-expression but also on its role in affording the public access to discussion, debate, and the dissemination of information and ideas." *First National Bank of Boston* v. *Bellotti,* 435 U.S. 765, 783 (1978) (footnote omitted) (citing cases).

We submit that under constitutional principles commerical speech—advertising—cannot be restricted or proscribed unless a court [1] determines (1) that it is deceptive, or (2) that the restriction directly serves a substantial governmental interest and the restriction does not exceed what is necessary to serve that interest. As the Supreme Court has explained in the context of advertising for professional services: "Commercial speech doctrine . . . may be summarized generally as follows: Truthful advertising related to lawful activities is entitled to the protections of the First Amendment. But when the particular content or method of the advertising suggests that it is inherently misleading or when experience has proven that in fact such advertising is subject to abuse, the states may impose appropriate restrictions. Misleading advertising may be prohibited entirely. * * * Even when a communication is not misleading, the state retains some authority to regulate. But the state must assert a substantial interest and the interference with speech must be in proportion to the interest served. *Central Hudson Gas Co.* v. *Public Service Comm'n,* 447 U.S., at 563-564. Restrictions must be narrowly drawn, and the state lawfully may regulate only to the extent regulation furthers the state's substantial interest. *In the Matter of R.M.J., 102 S. Ct. 929, at 937-38 (1982)" (footnote omitted).*

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[1] *Blount* v. *Rizzi,* 400 U.S. 410 (1971); *Brookhart* v. *Janis,* 344 U.S. 1, at fn. 4, page 4 (1966).

Above all, and this is our overriding interest, non-deceptive advertising is not to be censored because of bureaucratic idealogies as to what is "fair" or "unfair".

THE FEDERAL TRADE COMMISSION SHOULD NOT HAVE THE POWER TO PROSCRIBE OR RESTRICT TRUTHFUL, NON-DECEPTIVE COMMERCIAL SPEECH AS "UNFAIR"

If advertising is to continue to play its vital role in our economy it must be protected from unjustified restraints. Truth and accuracy are concepts which advertisers can and should live with. On the other hand, advertising cannot live with an amorphous and ever-changing concept of "unfairness". The characterization is no standard; like beauty, it varies with the eye of the beholder.

We are aware that members of the Commission, and others, have proposed statutory language with respect to "unfair . . . acts or practices" that they believe will provide guidance for the Commission and thereby ensure responsible Commission management. While we respect their concern, and we agree with their recognition that the present statutory language is unacceptable, we believe that no attempt to define the word "unfair" could be sufficient to satisfy First Amendment requirements.

For example, the three-part specification for "unfair acts or practices"[2] that was contained in Section 2 of S.2499, 97th Congr., 2d Sess. (1982) has been asserted by some to be sufficient to foster proper regulatory observance and preclude administrative overreaching in the area of constitutional governance. But that is completely inaccurate. Determinations in given instances of what is consumer "injury" and whether it is "substantial"; whether it can "reasonably" be "avoided" by consumers; or whether the act or practice is devoid of "offsetting benefits" of whatever nature, are all such subjectively laden value judgments that they would leave the Commission (or, more intolerably, even a majority of two unelected Commissioners out of a quorum of three) with no less absolute a discretion than it possesses now with the amorphous and unbounded term "unfair". After all, the prescriptions of "substantial" and "unavoidable" injury without "offsetting benefits" mirror those set forth in the Commission's letter to Senators Ford and Danforth dated December 17, 1980, and appear to be essentially the same considerations asserted by the Commission to have been satisfied in the notorious Children's Advertising Proceeding.[3]

In our view, the mandate of the First Amendment requires a more inclusive protection for commercial advertising.

We have proposed in the past, and we propose today that the Federal Trade Commission Act be amended to provide that the term "unfair . . . acts or practices" should not be employed to restrict the content of commercial advertising.

We have two basic reasons for recognizing this constitutionally dictated protection for commercial advertising. The first reason, as explained above, is that advertising, unlike most other acts or practices within the FTC's jurisdiction, is a form of speech protected by the First Amendment to our Constitution. The second reason is that it is needed to preclude the types of abuses which have taken place in the past.

Once again let us emphasize that we are not seeking a special haven for the advertising industry, safe from the scrutiny of the Commission. Our proposal on unfairness is directed exclusively to only one aspect of our conduct: the content of advertising. It is the speech aspect of that creative effort which enjoys constitutional protection.

While this Committee is well aware of the abuse heaped upon advertising by the Commission in the 1970's, we would like to bring a few examples to your especial attention. The most obvious is the Children's Television rulemaking effort, which was brought to an end as the result of congressional action. In the words of the then Chairman of the Commission, that rulemaking proceeding was premised on the concept that "children's advertising is inherently unfair". The remedies which the Commission would have imposed to correct this alleged unfairness would have, among other things, banned all television advertising of all products to young children (probably under age 8) and would have banned the advertising of sugared products to older children (probably under age 13). If that rule had gone into effect, it would have been unlawful to advertise baseball gloves, toys, cereal or any other product on, at least, Saturday morning television. Presumably one could not have advertised candy on any television program in which children made up a sizable percentage of the audience.

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[2] "[T]he Commission may exercise its 'unfairness' jurisdiction only when: (1) an act or practice causes substantial injury to consumers; (2) the injury cannot reasonably be avoided by consumers; and (3) the act or practices has no offsetting benefits."

[3] One commentator has noted, in regard to the "standards" set forth in the Commission's letter of December 17, 1980, that: "[i]n considering criteria for determining whether an act or practice is unfair, one difficulty with the current standards for defining "unfair" acts or practices is that they are based on a "value" rather than a "factual," foundation, with the result that the Commission, by applying its own values, has virtually unlimited discretion and may take actions that appear purely arbitrary." Denger, *The Unfairness Standard and FTC Rulemaking: The Controversy Over the Scope of The Commission's Authority,* 49 Antitrust Law Journal 53, 84 (Summer, 1980 Part I).

Several other trade regulation rulemaking proceedings involved application of the unfairness doctrine to advertising. One of these proceedings, initiated November 11, 1975 (40 Fed. Reg. 52631), proposed a rule which would have made it unlawful to make an advertising claim for any over-the-counter drug which the Commissioner of Food and Drugs had determined could not be made in labeling the drug. If that rule had issued, it would have been "unlawful" to truthfully advertise an effective analgesic, for example aspirin, as useful for backache, muscular aches and pains, menstrual pains or pains following tooth extraction if the FDA-mandated label stated only that the product was good for headaches, occasional minor aches and pains and reduction of fever. Truthful advertising, completely devoid of deception, would have been suppressed.

Another example of overreaching is the Commission's completed and effective rule for Games of Chance in the Food Retailing and Gasoline industries. Until last August, when it was changed, this rule prohibited a food store that had used a game promotion for six months from beginning another such promotional program until it had waited six months from completion of the first program. The Commission reasoned that the second promotion would be "unfair" because the consumers had become familiar with the first game promotion and would be confused by the second. In addition, this rule currently precludes the use of radio or television to advertise a game of chance promotion because it requires that the full details of the game's rules and all prizes and odds must be disclosed in all such broadcast advertising—such an obvious impossibility that the present Commission has, as of January 10, 1983 temporarily suspended this de facto prohibition of broadcast advertising.

We could point out other examples of abuses such as the Food Advertising rulemaking procedure which was, in part, based upon unfairness. However, to do so would merely burden the record, for it seems unlikely that any reasonable person would dispute the fact that the Commission has used the unfairness doctrine in an abusive fashion.

Neither can it be disputed that the Commission has viewed "unfairness" as a license to censor truthful advertising based upon the Commission's economic or other ideologic biases. One quick example:

In its Statement of Basis and Purpose for its Vocational and Home Study Schools Trade Regulation Rule, 43 Fed. Reg. 60796, at 60805 (1978), it pronounced: "It is a basic tenet of our economic system that information in the hands of consumer facilities rational purchase decisions; and, moreover, is an absolute necessity for efficient functioning of the economy. If consumers have access to good information on the facts significant to their purchase decisions, then the normal forces of the market are likely to induce sellers to improve those characteristics of the product or service that are most important to the consumer." In other words, non-deceptive advertising can be censored as "unfair" for failure to set forth such "information" as the Commission might deem "facilitat[ive]" of what the Commission views as "rational purchase decisions" and necessary "for efficient functioning of the economy"!

Why does the advertising community feel that it is necessary to propose that Congress ban FTC's resort to the unfairness doctrine across the board for advertising content, i.e., in both rulemaking and adjudications? The short answer is that any act or practice the Commission could regulate in rulemaking it can undertake to regulate in case-by-case adjudications. If unfairness remains for advertising adjudications, a future Commission might decide to bring individual cases against advertisers based on the same unfairness theories which produced the aborted over-the-counter drugs, children's television advertising, and food advertising rules. The advertisers subject to such innovative and ideologically generated orders to cease and desist would, even worse, be at competitive disadvantage versus other sellers not subject to such orders.

The threat of a possible unfairness charge operates as an effective, chilling, prior retraint on inventiveness and innovation in advertising. Advertising is an art form; it must motivate and persuade or its cost constitutes an economic waste. It must have freedom to do its legitimate job.

The Committee should think also of the economic costs which the FTC's pursuit of the unfairness doctrine imposes upon advertisers, and thus on the consuming public. It is wrong to assume that no harm is done when the FTC goes off on one of its unfairness escapades but subsequently decides to abort the effort. Someone has to pay for that exercise, and in the final analysis it is the taxpayer and the consumer. Our proposals do no more than preserve the liberty which advertisers enjoyed until the Commission's recent "unfairness" initiatives.

For the above reasons, and those set forth at pages 3-4 of this Committee's Report No. 97-451 on S. 2499 (supra), we support the amendment of the Federal Trade Commission Act set forth under Section 5(a)(2) of S. 2499 "That the Commission shall have no authority under this section or section 18 to prohibit or otherwise regulate any commercial advertising on the basis of a determination by the Commission that such commercial advertising constitutes an unfair act or practice in or affecting commerce."

SINCE ADVERTISING IS SPEECH PROTECTED BY THE FIRST AMENDMENT, THE FEDERAL TRADE COMMISSION'S AUTHORITY TO REGULATE OR PROSCRIBE ALLEGEDLY "DECEPTIVE" ADVERTISING MUST BE CLARIFIED

We respect and endorse the suggestions of FTC Chairman Miller that the FTC Act include an explicit definition of what constitutes such a "deceptive act or practice" as satisfies constitutional criteria for abridgement of commercial speech. The need for such a definition has also been pointed out by Professor Rosden in his treatise The Law Of Advertising: "It has been said sometimes, and not without a measure of truth, that an advertisement is deceptive if the Federal Trade Commission calls it so." Section 18.03, pp. 18-46.

The Commission should not be left unbridled and thus able to ignore the congressional mandate that regulatory activity be in the public interest.

Our prior comments to this Committee, as with our statement today, propose a statutory formulation for the Federal Trade Commission Act. Nonetheless, let us emphasize at the outset that we are not wedded to any particular words, provided that whatever articulation might be chosen achieves our fundamental purposes. In this matter our principles are our objectives.

From its enactment, the Federal Trade Commission Act has unequivocally voiced a congressional intent that public and private resources not be wasted on regulatory activities that are not required to serve the public interest. E.g., FTCA § 5(b), 15 U.S.C. § 45(b). As the Supreme Court made clear in *FTC* v. *Klesner*, 280 U.S. 19, 28 (1929): "To justify filing a complaint the public interest must be specific and substantial". The Commission and the courts must give more than lip service to the concept that the federal government should avoid pursuit of trivia and concentrate on matters which are material consequences of intentional or reckless behavior or which otherwise unlawfully harm consumers significantly.

In an attempt to provide a particular statutory formulation that we believe will satisfy the principles we explain today, we recommend that the FTC Act be amended to provide, in effect:

"Deceptive acts or practices in or affecting commerce are hereby declared unlawful where such acts or practices—

"(1) consist of material representations known to be false or made in reckless disregard of their truth or falsity, or

"(2) consist of misrepresentations that directly cause or may foreseeably result in substantial economic injury to consumers acting reasonably in the circumstances."

This formulation is the one proposed by us in our subsequent Joint Statement to this Committee filed as part of the record of our Joint Statement of March 19, 1982, as well as in our Joint Statement of July 22, 1982.

The portion of this formulation which has since attracted the most attention is the first subclause, which would make unlawful any material misrepresentations "known to be false or made in reckless disregard of their truth or falsity"—regardless of whether the representations caused or were likely to cause consumer injury. Critics assert that this subprovision could inject into the FTC Act a standard akin to that applicable to common law libel and, they assert, might make it difficult for the Commission to mount successful challenges to misleading advertising. Nothing could be further from the truth. For one thing, the criticism overlooks that the first subclause does not stand alone. It is supplemented by the second subclause. This first subclause will actually clarify the Commission's position with respect to false advertising by affirming the Commission's authority to pursue such challenges even without a finding of consumer injury.

The advertising industry has always believed that advertising known to be false or recklessly unsubstantiated should not be countenanced by the Commission regardless of its lack of injurious impact on consumers.[4] As we have stated on previous occasions, and we reiterate today, an advertiser and its agency must ensure that positive claims made in their advertisements are substantiated by and based upon support such as would satisfy a reasonably prudent advertiser as to their truth. Failure to meet that standard of conduct, in our view, constitutes reckless behavior, hence "reckless disregard of * * * truth or falsity".

The second subprovision of our proposed formulation provides the Commission with an additional authority to challenge advertisements even when the advertiser has acted without knowledge that its representation is false and without having failed to obtain reasonable substantiation. In such good faith situations, the Commission would nonetheless be able to challenge the advertising if it contained misrepresentations that 1) caused or might foreseeably result in substantial economic injury to consumers who were 2) acting reasonably in the circumstances.

This subclause of our proposal does not require that the economic injury to each and every consumer be substantial in order to support a Commission initiative. On the contrary, as the Supreme Court set forth in *FTC* v. *Klesner*, supra, injury that is "substantial" enough to satisfy the requirements of the public interest may be based on an aggregate of injuries to affected consumers. "Sometimes, because, although the aggregate of the loss entailed may be so serious and widespread as to make the matter one of public consequence, no private suit would be brought to stop the unfair conduct, since the loss to each of the individuals affected is too small to warrant it." 280 U.S. 19, 28 (1929).

Indeed, the Commission itself has confirmed that the public interest standard should control in regard to measuring the extent of injury. In the Commission's December 17, 1980 letter to Senators Ford and Danforth, the first requirement for Commission initiation of a challenge under a part of Section 5 of the Act was stated as follows: "First of all, the injury must be substantial. The Commission is not concerned with trivial or merely speculative harms.* [*An injury may be sufficiently substantial, however, if it does a small harm to a large number of people, or if it raises a significant risk of concrete harm.]"

We see no reason why, in this regard, our proposal should be interpreted as a significant departure from the Commission's present stated policy.

Our proposal would also direct the Commission to rely on (and authorize reviewing courts to consider) whether the advertisements may foreseeably mislead consumers "acting reasonably in the circumstances". At present, the courts have virtually precluded themselves from questioning a Commission decision that an advertisement has an undefined quality described as "capacity to deceive" the public. In the words of one court, "The meaning of an advertisement to the public and whether it is calculated to deceive is a question of fact, and the Commission's conclusions with reference thereto may not be disturbed unless arbitrary or clearly wrong". *Gulf Oil Corp.* v. *FTC*, 150 F.2d 106, 108 (5th Cir. 1945). Such a simplistic rule has resulted in orders restricting advertising representations where there had been no showing that even unthinking, ignorant, or highly credulous consumers could have been misled. *E.g., FTC* v. *Mary Carter Paint Company*, 382 U.S. 46 (1965); *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374 (1965); *Spiegel Inc.* v. *FTC*. 494 F.2d 59 (7th Cir.), cert. denied, 419 U.S. 896 (1974); *Prima Products, Inc.* v. *FTC*, 209 F.2d 405 (2d Cir. 1954); *Gelb* v. *FTC*, 144 F.2d 580 (2d Cir. 1944).

Our proposal would merely affirm that something akin to a rule of reason should be a part of the process of interpreting advertisements in Commission cases. The courts would continue to bear the duty to review a Commission finding as to the deceptive nature of an advertisement, but in doing so they would evaluate whether the evidence relied upon by the Commission supported a finding that *reasonable* consumers were likely to be mislead.[5]

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[4] Significantly, the Commission has for some time now been operating on a principle less demanding upon advertisers than the one we propose here, a principle that the marketplace for "low ticket" items is "self-correcting". As we understand it, this means that the Commission will not proceed in an advertising case when the advertised goods are low in cost, frequently purchased and the consumer can judge for himself or herself whether the products live up to the claims made for them. See 1975 FTC Policy Protocol: Deceptive and Unsubstantiated Claims. In such situations, the theory goes, the consumer will quickly shift his purchasing choice to another product and the problem will be corrected by operation of the market.

[5] Here again, we are not attempting to inject an unprecedented standard into Commission decision making. In *Aronberg* v. *FTC*, 132 F.2d 165, 167 (7th Cir. 1942), the court said: "The ulti-

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It is important to note, however, that our proposal is carefully worded to afford appropriate protection to vulnerable groups. The language "acting reasonably in the circumstances" is intended to protect such groups by permitting that an advertisement's capacity to deceive be calculated in reference to the audience's orientation and motivation.

The advertising industry is convinced that any criticism leveled at its position on deception is based upon a misunderstanding of the specific legislative language it is proposing. The Committee might ask why it should be "impossible" for the Commission to prove that a misrepresentation "may foreseeably result" in substantial injury to consumers. Or, what is so "revolutionary" about a requirement that advertising statements be interpreted as reasonable consumers would interpret them? What is so "reasonable" about holding an advertisement unlawful based upon an unreasonable reading of it.[6] We are confident that the answers to these and other questions will demonstrate the worth of our formulation. We offer our proposal in the form of statutory language in an attempt to assist this Committee in exploring concerns of principle that have been raised about these aspects of the Commission's authority. We believe that our formulation provides a definition of Commission authority that will help to clarify constitutional requirements and congressional purposes that must govern responsible regulation of advertising. At bottom, however, our concern remains not with carved-in-granite verbiage but with the principles we explain today and have set forth in prior statements to this Committee.

THE COMMISSION SHOULD NOT HAVE THE POWER TO EMPLOY BACK DOOR RULEMAKING

We will now turn to a subject that is to us of the highest significance. We believe and strongly urge that Section 5(m)(1)(B) of the Federal Trade Commission Act should either be repealed or amended as in S. 2499 (supra) under section 5(m)(2). Section 5(m)(1)(B) authorizes the Commission to bring enforcement proceedings in district courts against advertisers who violate cease and desist orders obtained in adjudicative proceedings in which they were not parties. We believe that such a procedure constitutes "back door rulemaking".

As we see it, the Commission could someday decide to forego rulemaking under Section 18 of the Act since it has this even handier loophole by which to force its will upon an entire industry.

The rulemaking safeguards of the Magnuson-Moss Act were imposed to ensure that the affected industry had an opportunity to defend itself. As the drafters of the procedural safeguards put it: "Because of the potentially pervasive and deep effects of rules defining what constitutes unfair or deceptive acts or practices and the broad standards which are set by the words "unfair or deceptive acts or practices", the Committee believes greater procedural safeguards [than mere notice and comment] are necessary.[7] "

If even the actual giving of notice and an opportunity to file comments in a rulemaking proceeding were deemed inadequate, it seems obvious that the complete absence of these opportunities sanctioned by Section 5(m)(1)(B) is intolerable.

This section hangs like a "sword of Damocles" over the heads of all advertisers. The Commission's chilling use of it is evident in its widespread in terrorem circulation of extant cease and desist orders to industries involved, with its unmistakable, threatful implications. We are concerned that the section affords the Commission leeway to select some small or complacent company as a target, exact from it a consent or weakly defended order to cease and desist, and then enforce the order against an entire industry. This is not the way industrywide rules should be promulgated. It makes a mockery of due process.

We greatly appreciate this opportunity for the advertising community to present its views on these important subjects.

The CHAIRMAN. Thank you, Mr. Weil.

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mate impression upon the mind of the reader arises from the sum total of not only what is said but also of all that is *reasonably* implied. (Italic added.)

Later, in *P. Lorillard Co.* v. *FTC*, 186 F.2d 52 (4th Cir. 1950), a court held: "In determining whether advertising is false or misleading . . ., regard must be had, not to finespun distinctions and arguments that may be made in excuse, but to the effect which it might *reasonably* be expected to have upon the general public." (Italic added.)

[6] *See, e.g., Kroger Co.*, D. 9102 (Sept. 25, 1981) (ads for "Price Patrol" found deceptive despite Commission concession that their claims of lower prices were basically true); *Gelb v. FTC*, 144 F.2d 580 (2d Cir. 1944) (ad for "permanent" hair coloring found deceptive because, speculatively, some consumers might think "permanent" meant "forever effective with only one application").

[7] H. Rep. No. 93-1107, 93rd Cong., 2d Sess., May 17, 1973, p. 45.

I think I will take Mr. Greenberg's statement next, and then I have some questions for all of you.

Mr. GREENBERG. Thank you, Mr. Chairman.

As it did last year, Consumer Federation of America opposes this exemption in no uncertain terms. The FTC has had this unfairness authority for more than 40 years. We feel the Commission has used the power in a responsible way to remedy genuine abuses in advertising.

We also believe the Commission has responded thoughtfully to criticisms of unfairness. The policy statement of December 1980 should have quieted legitimate concerns about any abuse of unfairness. Obviously that has not been enough for the advertising industry. Once again it seeks a total exemption from unfairness rules and cases.

Mr. Chairman, we have been over this terrain together before, so let me try to be as brief as possible.

First, there is real substance in the rules and cases the Commission has brought against advertisers under unfairness. An industry does not attempt to write an exemption into a statute merely to clarify the law. Make no mistake about it, an exemption will mean genuine gain for advertisers and genuine loss to the public.

Second, there is real merit in the FTC's unfairness proceedings. As a society there is broad agreement that children should not have an opportunity to imitate dangerous behavior. There is broad agreement that other vulnerable groups should not be taken advantage of. And there is broad agreement that failing to disclose critical information about a product should not be acceptable commercial practice. In short, there is broad agreement that certain marketplace behavior is unfair.

Third, let us accept, for now and forever, that a creative lawyer can find a way to stuff, bend, and wrench these unfairness situations into a box called "deception." We have all tried this game, and it is quite stimulating—as an academic pursuit. But let us also accept that what makes for interesting conversation in the classroom often makes for lousy law and lousy policy. There is simply no doubt in my mind that the same people who proclaim that all unfairness cases can be captured under deception are the very same people who would scream "unfair" if the FTC tried to bring those cases under deception.

There is just no reason to turn ourselves inside out defining and redefining "deception" when unfairness is available, has proven useful in protecting the public, and has had its outer bounds and daily standards defined by the Commission.

Fourth, while it is clear that the advertising industry does not trust the FTC, it is also becoming obvious that the advertisers must not trust the Congress. In asking for this total exemption, the industry is saying that Congress cannot adequately perform its oversight function regarding an unfairness authority which will in all likelihood be defined by statute this session.

Given the spirited history of Congress and the FTC on unfairness, that position is simply not credible. Especially on unfairness, Congress has shown itself quite capable of exercising oversight and, of course, the industry has proven eternally vigilant in helping Congress monitor the Commission.

So CFA believes that the children's advertising debate, the December 1980 policy statement, the days and days of hearings ever since, all make it a virtual certainty that the FTC will step very carefully in applying unfairness. If the Commission does happen to step out of bounds, Congress knows the issue, the standards, and the players on unfairness and it will be watching very closely.

Not only do the advertisers not trust Congress. Neither, it appears, do they trust the courts. To say that Congress must act to protect constitutional rights is to say that the courts cannot or will not. But why is a blanket statutory exemption necessary to vindicate the first amendment freedom of advertisers? All Commission actions are fully reviewable in court. Thus, any exercise of unfairness authority that intrudes on protected first amendment activity will be swiftly overturned.

To say all that is to miss an important point: Whatever the limited protection the Supreme Court recently accorded commercial speech in *Central Hudson*, no where does the first amendment shield deceptive, misleading, or unfair speech from legal consequences. The first amendment may guarantee our ability to lie, but it does not exempt us from Government action if that lie violates a Federal statute. We see no reason for any change in this balance.

Nor does the public, Mr. Chairman.

Atlantic Richfield recently commissioned a broad poll by Lou Harris which covered consumer issues and Government regulation. One thing is very clear from this poll: People are concerned about the quality and the credibility of advertising—67 percent said that the Government should intervene to stop misleading TV ads. When they were asked about how much we should regulate advertising, 60 percent responded that the Government is not doing enough. Only 5 percent felt that the Government has gone too far. That is an endorsement for vigorous regulation by a margin of 12 to 1.

So for all these important substantive reasons, Mr. Chairman, as well as to put a stop to the pilgrimage of industry groups seeking special privileges, we urge you not to include an unfairness exemption in this FTC reauthorization.

[The statement follows:]

Statement of David I. Greenberg, Legislative Director, on Behalf of Consumer Federation of America

Mr. Chairman and members of the Committee. Consumer Federation of America (CFA) is pleased to have the opportunity to appear today to discuss the proposed exemption of commercial advertising from the Federal Trade Commission's firmness authority.

As it did last year, CFA opposes this exemption in no uncertain terms. We believe our 200 organizations and their 35 million members are broadly representative of the public and, on this issue, our members are in total agreement. No exemption is warranted, justifiable or appropriate as a matter of law or as a matter of public policy.

The FTC has had this unfairness authority in excess of 40 years. We feel the Commission has used the power in a responsible way to remedy genuine abuses in the advertising marketplace. We also believe that the FTC has responded thoughtfully to criticisms of its unfairness authority. The resulting policy statement of December 1980 should have quieted legitimate concerns about any future abuse of unfairness.

Obviously, that has not been enough for the advertising industry. Once again, it seeks a total exemption from unfairness rules and cases. Now, the industry representatives here with me today have stated repeatedly that they do not want a special interest provision, that they do not seek to weaken consumer protections, that they do not wish to harm the Federal Trade Commission in any way. But that is simply not the case.

Since we have all been over this terrain before, let me try to be as brief and as straightforward as possible.

First, there is real substance in the rules and cases the Commission has brought against advertisers under its unfairness authority. An industry does not attempt to write an exemption into a statute merely to clarify the law. Here, there will be genuine gain for advertisers and genuine loss to the public.

Second, there is real merit in these unfairness proceedings, merit that is apparent to the dispassionate observer. As a society, there is broad agreement that children should not have the opportunity to imitate dangerous behavior. There is broad agreement that other vulnerable groups—the elderly, the sick, the poor—should not be taken undue advantage of. There is broad agreement that failing to disclose critical information about a product should not be acceptable commercial practice. In short, there is broad agreement that certain marketplace behavior is unfair.

Third, let us accept, for now and forever, that a creative lawyer can find a way to stuff, bend and wrench these unfairness situations into a box called deception. We have all attempted this exercise, and, as an academic pursuit, it is quite stimulating. But let us also accept that what makes for interesting conversation in the classroom can make lousy law and lousy policy. There is simply no doubt in my mind that the same people who march forward and proclaim that all legitimate unfairness cases can be captured under deception are the same people who would scream "UNFAIR" if the FTC at a different time had tried to bring those cases under deception.

Perhaps Commissioner Clanton said it best: "It would stretch the meaning of deception beyond all normal usage to say that every instance of coercion, every failure to live up to a bargain, every use of overreaching is inherently deceptive. . ." There is no reason to turn ourselves inside out defining and redefining deception when unfairness is available, has proven useful in protecting the public and has had both its outer bounds and daily standards defined by the Commission.

Fourth, while it is clear that the advertising industry does not trust the FTC, it is also becoming obvious that the advertisers must not trust the Congress. For in asking for this total exemption, the industry is saying that Congress cannot adequately perform its oversight function regarding an unfairness authority which will in all likelihood be defined by statute during this session.

Given the spirited history of Congress and the FTC on unfairness in advertising, that position is not credible. Especially on unfairness, Congress has shown itself quite capable of exercising oversight. And, of course, the industry has proved eternally vigilant in helping Congress monitor the Commission. To sum up, CFA believes that the Children's Advertising debate, the constant discussion ever since, the December 1980 policy statement and the days of oversight and authorization hearings all make it a virtual certainty that the FTC will step very carefully in using its unfairness power. And, as I have implied, if the Commission happens to step out of bounds Congress knows the issue, the standards and the players on unfairness and it will be watching very closely. That is sufficient protection for any industry.

Not only do the advertisers not trust Congress. Neither do they appear to trust the courts. To say that Congress must act to protect constitutional rights is to say that the courts cannot or will not. But why is a blanket statutory exemption necessary to vindicate the first amendment freedoms of the advertising industry? Any Commission action—whether it be a rule, a case, a consent decree or a demand for production of documents—is fully reviewable in court. Thus any exercise of unfairness authority that intrudes on protected first amendment activity can be swiftly overturned.

To say all that is to miss an important point. Whatever the limited protection the Supreme Court recently accorded commercial speech in Central Hudson, nowhere does the first amendment shield deceptive, misleading or unfair speech from legal consequences. The first amendment may guarantee our ability to lie, but it does not exempt us from government action should that lie violate a federal statute. We see no reason for any change in this balance.

Neither does the public. Atlantic Richfield Company recently commissioned Lou Harris to poll Americans on a broad range of questions concerning consumer issues and government regulation. Based on this poll—"Consumerism in the 1980's"—one thing is crystal clear. People are very concerned about the quality and credibility of advertising. 67 percent said that the government should intervene to stop misleading tv ads. Asked about the right amount of advertising regulation, 60 percent responded that the government is not doing enough about companies that fail to live up to their advertising claims. In stark contrast, only 5 percent felt that the government has gone too far in regulating ads. That is an endorsement for vigorous regulation by a margin of 12 to 1. To put these figures in context, Americans appear to be more concerned about advertising than they are about dangerous products. Only 48 percent of those polled sought more government action on product safety.

These sentiments are based on people's experience in the marketplace. Clearly they are not rooted in technical distinctions or lawyerly debate. Americans want to get their money's worth and ask the government to protect them against advertising that in any way denies them that value. I suspect that if you asked them—Should the government allow unfair ads?—they would look at you as if you were from Mars.

But, Mr. Chairman, at bottom that is the question before us today. Should the government do anything to make unfair advertising more likely? For that is precisely what this exemption would do. And while it would not remove all protections against advertising that can be reached under unfairness, it would have a real impact in those cases farthest removed from traditional deception theory and case law.

For that important substantive reason, as well as to put a stop to the pilgrimage of industry groups seeking special privileges, no unfairness exemption should be part of the FTC Reauthorization.

Consumer Federation of America would like to thank the Committee for the opportunity to testify today. While my statement has been quite general I will be glad to answer questions about the specific cases, and principles involved in the proposed commercial advertising exemption.

The CHAIRMAN. Mr. Greenberg, Thank you.

I might say to the advertisers, I am not sure I agree with the statement that the FTC has more power than we do. We have granted them the power; we can withhold it. As between the two, I would rather be the grantor than the grantee in that kind of a situation involving power. They deal only at our sufferance, but not on their own.

Mr. WEIL. When you speak of your power, Mr. Chairman, it is the aggregate power of the full legislative process which is missing for the FTC. In other words, in order to exercise the power over the FTC that you speak of, you would have to have the concurrence of the House, and the Senate, and the President.

Mr. GREENBERG. Senator Packwood?

The CHAIRMAN. But that is the way the FTC got the power to begin with was with the aggregate agreement of Congress and the President.

Mr. WEIL. Yes, but it might be Frankenstein's child.

Mr. GREENBERG. Senator, I am not an expert on advertising law, or even the FTC, but it seems to me that if we look at the last couple of years, it is fair to say that the FTC cannot spit in a congressional district without Congress knowing about it.

I do not say that that is inappropriate, but I think it is just very unlikely that the FTC is going to step out of bounds. We have heard of nothing since the December 1980 policy statement that leads us to believe differently. As long as we accept that there is real merit in the idea of avoiding some of these dangerous practices, and that they cannot all be covered by deception, I see no reason to restrict unfairness.

Mr. VERSFELT. Senator, may I comment on that?

The CHAIRMAN. Sure.

Mr. VERSFELT. I would agree with the speaker that in the last couple of years, with the extensive oversight that the Congress has felt the FTC needed, the FTC has behaved itself and has not, to the extent it had theretofore, begun initiatives that trampled on first amendment rights.

What we are trying to do through this statutory change is set up the legislation so that such extensive oversight will not be needed constantly in the future. We want to give the Commission the guidance it needs so it can go on for years, and years, and years without requiring such constant oversight to protect rights.

The **Chairman**. Mr. Weil, let me ask you, and the other two can answer if they want: Is your position that the FTC's application of its unfairness authority to advertising is always unconstitutional? Or only when it violates the principles of the *Central Hudson Gas* case? I have a followup question after you have answered.

Mr. **Weil**. Certainly the latter. The Supreme Court has in *Central Hudson,* and then reaffirmed in *R.M.J.,* set perimeters within which the State, the body politic, can act under the first amendment. So that if the Federal Trade Commission acts within those bounds, it would not be an infringement of the first amendment.

The **Chairman**. And if they act without those bounds, it would be and the Court would overturn it.

Mr. **Weil**. Well, you see, I know that comment was just made. I think there is a little overstatement in saying it will be "swiftly overturned." One of the things we have to be concerned about—and I think it is why it would be very, very proper and beneficial to have it in the statute—is the chilling effect.

You have your medium-sized, your moderate-sized, your small-sized advertisers, and many of the larger ones as well, who have neither the stomach and, in the case of the smaller ones, the funds to pick up a gauntlet which can take them the whole road all the way up to the Supreme Court. That is not swiftness. The chilling effect therefore, unless Congress makes clear its own intent and the boundary lines for the Commission, that the Commission operate within the mandate of the first amendment, you do have this chilling effect and you get all these consent orders, many of which I think are horrendous; that a company should have to have entered into consent orders of the kind we see coming down even today.

They do it because they cannot stand the gaffe of testing this constitutional issue which, in the first case, probably should be headed all the way up to the Supreme Court.

The **Chairman**. But your answer, it seems to me, applies to any other Federal agency, not just the FTC. The broadcasters will make the same argument on many of the decisions of the Federal Communications Commission.

Mr. **Rogal**. Senator Packwood, the jurisdiction of the Federal Trade Commission is catholic. It covers everything that moves in commerce in the United States, every advertisement that goes across the line.

Now in both *R.M.J.* and in *Central Hudson,* the Court said: "Yes, under certain circumstances it is permissible to regulate speech." But in both cases, the thrust of the holding was that the restriction or restraint must be narrowly drawn. I submit there is nothing narrow about "unfairness."

Can you put yourself in the position of the advertising agency, or the advertiser who was preparing the Ewell Gibbons ad in which a naturalist was shown eating cactus pears, or something of that nature, and predicting that there was something wrong with that advertisement?

Now theoretically that case could have been brought under deception—we never know in these cases, which is another point. The Commission never tells us when they are proceeding on unfairness. In every one of the cases that have been mentioned to you as being grounded on unfairness, the Commission's complaints and orders were all couched as "unfair or deceptive acts or practices." Still, predictability is the hallmark of a constitutional restriction. There is nothing predictable about the unfairness standard when you are preparing advertising copy or any other kind of commercial speech.

The CHAIRMAN. Predictability is one hallmark. But it is not the only hallmark of a constitutional government. I mean, Russia is very predictable. My hunch is that they are significantly more predictable than we are in terms of the enforcement of their internal laws. I am not sure that is the standard by which we ought to necessarily operate.

Mr. ROGAL. Well, even due process requires that any law—and you have to remember that this Congress in all its wisdom gave the Commission the power to draft legislation in its stead; and that legislation is punishable by fines, and one recently reached almost $2 million.

So you have given them the authority to——

The CHAIRMAN. Is that the *Reader's Digest* case?

Mr. ROGAL. Yes, sir.

The CHAIRMAN. That was a fine imposed by the Court.

Mr. ROGAL. That is right.

The CHAIRMAN. Not by the Federal Trade Commission.

Mr. ROGAL. No, but this Congress gave them the right.

The CHAIRMAN. But it was the Court that imposed the fine.

Mr. ROGAL. That is true. That is true. But my point is that they can draft these statutes, which is what they are, punishable by horrendous fines, on this amorphous concept of unfairness. We just do not believe that power should be given to nonelected officials.

The CHAIRMAN. Wendell?

Senator FORD. You can have Senator Gorton's time, if you want.

Let me follow up, Mr. Chairman, on your statement. As I understood what you were saying, even though the courts impose a fine, the ability was given by Congress to the FTC to get into that arena, first.

Yesterday, or day before yesterday I think we discussed putting a cap on the fines after the *Reader's Digest* case. Is that not right, Bob?

The CHAIRMAN. Excuse me. I did not hear you.

Senator FORD. Did we not discuss on Wednesday putting a cap on the fines?

The CHAIRMAN. Yes.

Senator FORD. So we are I think following your train of thought here as it relates to the ability of the FTC to assess civil penalties.

Mr. Chairman, let me ask the entire panel if they wish to comment on this question: The committee report on S. 2499 states, and I quote from that: "Unsubstantiated advertising was originally addressed as an 'unfair practice,' but subsequent Commission decisions have firmly established the dissemination of unsubstantiated advertisements as a 'deceptive practice' as well. This section which limits the use of unfairness in commercial advertising is not intended to impair in any way the Commission's advertising substantiation program."

Would you all comment, on that statement?

Mr. **Versfelt**. I will comment, Mr. Senator. The AAAA agrees completely with the words you quoted. The Commission in recent years has made clear that unsubstantiated advertising is deceptive—inadequately substantiated advertising is deceptive. That is a principle with which the advertising agency members of the AAAA agree wholeheartedly.

We believe, therefore, that to excise from the statute the jurisdiction on unfairness will do nothing to impair the ad substantiation program. We are perfectly happy with that.

Mr. **Rogal**. Senator, the courts in two cases that I can remember right now—the *Firestone* case and in the *Porter & Dietach* case—in both of them the courts refused to find "unfairness" and went on "deception" when they affirmed the Commission's orders to cease and desist. They found that the practices were deceptive.

As I said earlier, all of those cases are always brought under unfair or deceptive acts or practices, and the Commission usually does not differentiate.

Senator **Ford**. Has there ever been a case won just on unfairness?

Mr. **Rogal**. Well, the *Pfizer* case is the case that is cited quite frequently, but you have to remember it is not really a case. In that sense it is more of a memorandum by the Commission of its view of the substantiation theory. The Commission did not even give Pfizer the opportunity to appeal because it did not issue an order to cease and desist. It just announced what its substantiation policy was, and then ended the case and closed it.

Senator **Ford**. OK.

Mr. **Greenberg**. Senator Ford, when we talk about how deception and unfairness overlap, there are a couple of important points.

No. 1, it is just good lawyering for the FTC and for any lawyer to plead all possible bases of jurisdiction. In any FTC case we would all plead both unfairness and deception.

One other thing is very important. My colleagues on the panel today said that they are not just interested in eliminating unfairness jurisdiction. They are also interested in circumscribing or, as they call it, "defining" deception. That is exactly what we predicted.

Not only will cases with real merit no longer be able to be brought under unfairness, but if deception is narrowed—as every definition I have ever seen of "deception" does—then these cases will never be brought under any theory.

Mr. **Weil**. Senator Ford, the definition of "deception" which the advertising community has proposed leaves room, or has room within it and quite deliberately so, for the requirement of reasonable substantiation of any advertising claim that is made. We define "deception" as including reckless disregard of the truth or falsity of the advertised claim.

It is our feeling that certainly any advertiser who would proceed with a claim without having reasonable substantiation for it is acting with reckless disregard of its truth or falsity. So that the advertising community is squarely behind the requirement that there be reasonable substantiation for any advertising claim. That is a reasonsibility which advertisers should bear, and we want them to bear.

The CHAIRMAN. Let me ask a followup question on that. Would you be willing to have that test, almost a per se test, written into the law?

Mr. WEIL. On deception?

The CHAIRMAN. Yes.

Mr. WEIL. Yes, we are proposing it.

The CHAIRMAN. Are you willing to agree that any ad that is made without prior substantiation is automatically reckless under your deception proposal? Would you be willing to let that be a standard for the FTC to enforce? If the FTC finds that there is not adequate substantiation, that in and of itself is illegal? You would not in this case have to worry about unfairess or deception; they just look at the ad, and they look at the substantiation, and if it is not there that is a per se violation?

Mr. WEIL. In principle that sounds fine. However, let me point out that the problem is with the level of substantiation that is required. Pfizer, the genesis of this whole doctrine, spoke of "a reasonable basis." We certainly agree with that.

The Commission in three cases that it brought in the analgesics field started by insisting that the level of substantiation in order not to be unfair had to be proof beyond any substantial question, which is a very different level.

Now in the technical fields it is hard to get any proof that another expert cannot raise a question about, and a substantial question. Therefore that level, if that is what the interpretation of the kind of a provision you are referring to, Mr. Chairman, would be, that level of substantiation would put a power of virtually absolute censorship into the hands of the Commission.

The CHAIRMAN. I want to make sure I understand where you are coming from. If the law said that you cannot make a claim without reasonable prior substantiation and you left that to the enforcement of the FTC, it would be their interpretation of "reasonable," and you would argue with their interpretation of "reasonable" in a particular case. Then as it went up to the court of appeals, they would give great deference as they do to all administrative agencies to factual findings. But you would be willing to live with that definition in the law?

We do not say "reasonable beyond a doubt," a criminal standard. We would just say "reasonable prior substantiation."

Mr. WEIL. Let me refine that a little bit if I may, Mr. Chairman. In one of its own cases, National Dynamics, the Commission there defined or described the "reasonable basis" as that degree of substantiation which would satisfy a reasonably prudent advertiser of the validity of his advertising claim. We would be willing to live with that.

Let me also say—and this is something that I can only speak for my own client on at this time because we have not cleared it with all the associations—one of the problems is what you have just referred to as the "deference" that the courts show. I think that may have to be in for judicial review under the first amendment. Because in other areas of the law, the Supreme Court has said that when dealing with the first amendment there cannot be censorship without full judicial trial and adjudication.

The CHAIRMAN. Well, of course they clearly make a distinction between "commercial" and "noncommercial" speech. Granted they give more deference to first amendment liberties than they do to lots of others. I am just trying to see if you would be satisfied with a standard that said "reasonable substantiation," and the FTC starts going down the line of ad after ad deciding whether it is reasonable substantiation.

Mr. ROGAL. Senator, may I interject something here?

The CHAIRMAN. Yes.

Mr. ROGAL. Suppose the ad is true? That is the problem that you run into——

The CHAIRMAN. I have some more followup questions on that when we get to further discussion but it is not my turn right now. The ad may be true.

Mr. ROGAL. That is right.

The CHAIRMAN. Then we are going to get down to a question of deception, and I will get to that in a minute.

Senator Gorton?

Senator GORTON. Go ahead.

The CHAIRMAN. All right.

Mr. VERSFELT. Senator, I am prepared to respond for the AAAA to the statutory suggestion you just made. If the FTC Act put into the FTC's hands the authority to proscribe advertising because it was not substantiated with a reasonable basis of substantiation, as that phrase is understood from *Pfizer*—that is, taking into account the claim that was made and the consumer responses to it—then I am confident the AAAA would support such an amendment.

The CHAIRMAN. Well, my hunch is that you would until you got a case where the FTC in your mind stretched it, and the court upheld it. Then we would be back trying to redefine it I think.

Mr. VERSFELT. Well, Senator, but even if such cases might arise in the future, a statutory change such as you have suggested would clarify to the FTC those factors that they should be considering in determining what substantiation is reasonable. That is, what the particular claim was when it was made, and the possible effects on consumers of a false claim.

The CHAIRMAN. Should the FTC have the right to proscribe ads that are true, even if they are deceptive?

Mr. WEIL. We think if they are made without whatever we will call for today "reasonable substantiation," yes.

The CHAIRMAN. They should have the right to ban them?

Mr. WEIL. Yes. The Association of National Advertisers——

The CHAIRMAN. Now but this is not a question of claims without reasonable substantiation. It is deception by omission. I am going on your assumption that the ad is indeed true.

Mr. WEIL. Literally true.

The CHAIRMAN. Yes.

Mr. WEIL. But even so, I mean one author once said that some of the cruelest lies are often told in silence, and we agree with that. We want responsible advertising. We do not want advertisers engaged in a business of reaching up into the air, taking a claim, and doing it recklessly, as we have in our definition, and saying: OK, I will run the claim until they catch me. If they catch me, I will stop. Maybe by that time I will be able to prove that it is true. We do not want that in the advertising business.

Mr. ROGAL. Senator, it is already in the act with respect to food, drug, and cosmetic advertising.

The CHAIRMAN. I know. And for that you have no objection?

Mr. WEIL. That is right.

Mr. ROGAL. We have no objection.

The CHAIRMAN. Would you have any objection to extending it?

Mr. ROGAL. To extending it?

The CHAIRMAN. Yes.

Mr. ROGAL. Well, it has been extended. I think it applies right across the board of all Commission jurisdiction. Deception by omission is a classic FTC violation.

The CHAIRMAN. Senator Lautenberg?

Senator LAUTENBERG. Not right now, Mr. Chairman. I will pass.

The CHAIRMAN. Slade?

Senator GORTON. I would like to follow up on one aspect of what the Chairman said. It seems to me that you have answered that in connection with substantiation you would agree that an unsubstantiated ad could appropriately be a violation of the law simply because it was unsubstantiated.

To the extent that you have said that, how does that square with your, I think quite eloquent, first amendment statement of protections in your written statement here? It would seem to me that you would instantly go to court and make a challenge of such a per se violation on that basis, assuming that you could sometime thereafter prove an ad is true. It seems to me that your answer is inconsistent with your first amendment position.

Mr. WEIL. I think not, Senator Gorton. Let me just develop that a moment.

We, the advertising community, would hate to think that the public believes claims are made in advertising without any reasonable basis. Therefore, we contend—and we think this is quite the fact—that when a consumer reads an advertisement making a claim for a product, implicitly there is represented to him by the mere fact of making the claim that the advertiser has a reasonable basis for it.

If in truth and in fact the advertiser does not have a reasonable basis for it, then that impression, that communication implicit though it might be is a misrepresentation and therefore falls under the heading of "deception."

Mr. ROGAL. Senator Gorton, there is a problem with the ad substantiation doctrine, because when you carry it to its fullest extent you end up with an almost insolvable problem.

Now here is what happened in the ad substantiation program, the FTC created a new type of unfair method of competition, which was, promulgating unsubstantiated advertising. The proof of it consisted merely of requesting from the advertiser whether he had substantiation. If he did not, that was sufficient for an order to cease and desist, but it would not touch the advertising itself for I do not believe that the Federal Trade Commission or any other body can stop advertising unless they can prove that it is false or deceptive.

So a pure advertising substantiation order would say, "cease and desist from making representations without having adequate substantiation". Presumably the ad that brought up the question could go right along. Then I suppose the Commission could bring an enforcement proceeding, but in the meantime of course the advertiser may have gotten substantiation, assuming this was a truthful ad.

So there is a problem, and I think that is what Chairman Miller is addressing. He wants to know, well what happens if you do bring in additional evidence during the course of the proceeding which proves that the ad is true? Do we still go ahead and issue an order because the advertiser did not have it at day one? And of course what do we do with respect to the advertisement which has now been proven to be true?

Mr. **Weil**. Please keep one thing in mind, if you will. If in fact the ad is true, there can be no consumer injury.

Senator **Gorton**. That is the case, and it is perhaps exactly that proposition that makes me doubt that you would be willing to settle for a per se substantiation rule.

Mr. **Weil**. The rule that we are willing to accept is in the definition for deception that we have proposed. That includes one subsection which would make it a violation of the law to make the claim with reckless disregard of its truth. Even though it does not injure consumers, even though it turns out to be true, if it was made in the first instance with reckless disregard as to whether or not it was true, that would be a violation. So the proof of our pudding is in our formulation itself.

Senator **Gorton**. Mr. Greenberg, I see you want to comment on that answer, but I want to get one question in for you to comment on in addition.

I would like you to tell me whether or not you agree with the others on the panel as to the inappropriateness of the Federal Trade Commission's use of the unfairness rule in the *Children's Television* case, in connection with over-the-counter drugs, games of chance, and the like.

Is the position of your organization that those were appropriate rulemaking activities? If you do not think that they were, how do we correct the situation created by those activities?

Mr. **Greenberg**. Senator Gorton, CFA's position was, and is, that the real problems the Commission attempted to get at in those proceedings were legitimate. If we can take the most extreme example, the children's advertising rule, if you look back throughout the oversight and reauthorization hearings for the Commission during the mid and late 1970's, you will see statement after statement after statement by important Members of Congress asking, begging, demanding that the Federal Trade Commission do something about children's advertising.

So it is not surprising that they turned around and did it. What changed was not the problem or the Commission, but the prevailing attitude in Congress. That is what got the Commission in trouble.

Now, just like we believe that people we disagree with make mistakes, we also believe that our friends make mistakes. We do not intend to apologize for the FTC sometimes being aggressive. A good business needs to be aggressive at times, a good labor union, a good politician, and a good consumer organization. So too the FTC—and it has made some mistakes in the process.

But we think that the most appropriate response has already occurred. That was the letter to the Senators on this committee in December 1980 explaining how the Commission would apply unfairness in the future. We think the three-part test—substantial injury that is not outweighed by countervailing benefits to consumers or to competition, and insuring that the injury could have been avoided—is appropriate and sufficient.

We think that that sort of discretion is certainly no more than the Federal Energy Regulatory Commission's ability to set natural gas prices based on just and reasonable principles, or the FCC's ability to grant TV station licenses based upon a standard of public interest, convenience, or necessity.

So we simply do not see a real need to move either to codify unfairness, or to exempt advertisers from the statute.

Senator GORTON. Thank you, Mr. Chairman.

The CHAIRMAN. Senator Ford.

Senator FORD. Under section 15 of the Federal Trade Commission Act, an advertisement of a food, drug, cosmetic, or a device which fails to point out harmful or other undesirable consequences of using the product is defined as being misleading and deceptive.

Is it correct, then, that even with the removal of commercial speech from the coverage of unfairness, the FTC is left with a remedy?

Mr. ROGAL. Yes, sir. That section was put in by the Wheeler-Lea Act in 1938, and that is a separate section. Of course it also says that a violation of this section is a violation of section 5.

Senator FORD. Yes.

Mr. ROGAL. But I do not anticipate that any change in the unfairness standard that we envision would change in any way that, because there you are dealing with misleading and deceptive advertising.

Senator FORD. Everybody seems to be agreeing. Mr. Greenberg?

Mr. GREENBERG. I guess I do not agree that the coverage would be universal and that everything would be preserved. I think that there would be certain instances of dangerous behavior that would not be protected under that section 15 provision.

One thing we all have to remember is that the communications marketplace and the ability of advertisers to communicate in new ways to all of us is changing so rapidly. That has some wonderful benefits and opportunities, but it also involves some dangers. I think that the FTC's unfairness authority over commercial advertising is one of the most important checks against those dangers.

Senator FORD. Well, we will have to admit that a stopped clock is right twice a day.

Let me ask the panel, then, this final question: Opponents of limiting the use of unfairness in advertising principally cite one group of cases that would escape FTC enforcement if the amendment is enacted, advertisements that depict children using a product in an unsafe way.

Well, would these cases be covered by the FTC's deception authority?

Mr. **Versfelt**. Senator, I would like to respond in several ways. The first and shortest answer to your question is: Yes, it would be covered by deception. It would be covered, it is our position, by the formulation that we have proposed, and we think it would be covered by all of the formulations that have been proposed by others.

But I do not want my response to end without saying, Senator, that never has there been an instance where an advertiser and its agency have been informed that children might be acting to their harm in response to a misrepresentation when they did not immediately change the ad.

Senator **Ford**. Well, my next question was: Has not every possible case been settled voluntarily?

Mr. **Versfelt**. Indeed it has, Senator.

Senator **Ford**. There is no problem with that at all?

Mr. **Versfelt**. None, whatsoever. We do not think that it is anything but a ghost or a strawman for opponents of our suggested formulation on deception to bring those cases up.

Senator **Ford**. Mr. Chairman, I have nothing further for this panel at the moment.

The **Chairman**. Senator Lautenberg?

Senator **Lautenberg**. I am to the right of Senator Ford; very good.

The **Chairman**. It will not last.

Senator **Ford**. Let me just say one thing. We will always be to the right of the chairman.

Senator **Lautenberg**. Thank you, Mr. Chairman.

For any of you who represent the advertising industry, could you describe some of the cases in which the FTC has abused its authority when it comes to authority over deceptive ads, or can you define any of those cases which lead you to propose further refinement of the meaning of "deception"?

Mr. **Weil**. Yes. As a matter of fact, we refer to a number of those cases in our full presentation. One that comes immediately to mind, for example, is the *Mary Carter Paint* case in which the advertisement was to buy 1 gallon and you would get another 1 free.

The facts of the case were that *Mary Carter* had followed that marketing process for years and years and years, and therefore, said the Commission, the second gallon was not free; that whatever the cost to the advertiser of that paint was, it was included in the purchase price which covered both.

However, the further fact was that the 2 gallons of Mary Carter paint selling at *x* dollars had twice the value of competing paint selling at the same price for 1 gallon. So, there was just a literal nit to be picked. The consumer was not hurt. The main intent and the main communication, I would say of the ad, was that by buying Mary Carter at *x* dollars the consumer was getting twice the value that he or she would get spending the same amount of money for competing paint. And indeed that is what the consumer did get.

There was no harm at all. Basically the ad was completely truthful. The circuit courts of appeal agreed with Mary Carter. The Supreme Court reversed with the deference that Chairman Packwood referred to before to the Commission. It was a ridiculous decision and an abuse of power. There are several others that we could cite, but that is an outstanding example.

Mr. ROGAL. Senator Lautenberg, this whole thing was kicked off, really, by the FTC's use of unfairness in the trade regulation rule proceedings. Over the years there have been many, many cases of the Mary Carter type such as the shaving sandpaper case involving a shaving cream, and things of that nature, where there was really no consumer injury. The Court even said in that case, this is a trivial matter but the FTC says they want to do something about it.

But the Children's Television rulemaking, or Kid Vid thing is a better example. In that proceeding the Commission was going to ban all advertising on television to children under school age. You could not even advertise a beach ball, or a baseball bat, or anything at all simply because they said that these little kids are too young to understand.

They were going to ban the advertising of highly sugared products, which we assume are candy and that sort of thing, to children up to about 12 or 13. This was the abusive use of unfairness.

We have mentioned some other trade regulation rule proceedings including the over-the-counter drug rulemaking where you could not have truthfully advertised that your cough syrup was for coughs; it would have had to be an antitussive. Now these were the types of abuses that brought us to the Hill 3 or 4 years ago and have kept us here.

Senator LAUTENBERG. I understand. But I think, Mr. Rogal, what we are looking for is a balance, are we not? If there is the unfortunate overreach that occasionally takes place, but in general the agency acts in the interest of the consumer, shouldn't we tolerate that?

Are there enough of these instances to say that, well, we ought to walk away from that kind of control all together and kind of leave it wide open? Because on occasion there have been a few cases of overreaching? The cases you have mentioned are among the more prominent.

Mr. Greenberg, I would like to hear what you have to say.

Mr. GREENBERG. Senator Lautenberg, I think that the couple of instances that have been cited probably would not be brought now under the Commission's own internal guidelines which require substantial injury. If the facts are as they were described to us, I think that the present Commission and future Commissions acting under either the December 1980 policy statement, or the statute—should Congress choose to codify unfairness—would not bring those cases.

One other important point: My colleagues have suggested several times today how important it is for them to be perceived by the public as fair and as not presenting misleading ads. I know that they say that in good faith.

But the fact of the matter is that when you poll the public, the public still has significant doubts. When 60 percent of the people polled say that the Government is not doing enough about misleading ads, that is a substantial problem. Let me put it in context.

Only 48 percent of the people said the Government was not doing enough about dangerous products. So here are more people worried about advertising than are worried about dangerous products.

Mr. **Versfelt**. Senator, if I may add, the 60-percent figure in the poll disturbs us because it is not 100 percent. We are not here trying to exempt advertising from regulation and oversight by the Federal Trade Commission. Indeed, we firmly believe that our proposals—that is, taking the unfairness jurisdiction away and codifying a clear definition of deception—will help the Commission to better target its resources to go after advertising that is in fact misleading and is in fact harming consumers.

That differentiates us, Senator, from those groups who are seeking special exemptions to get away from all supervision from the FTC altogether.

Senator **Lautenberg**. Mr. Chairman, do I have time for one more?

The **Chairman**. Go ahead, Frank. We have plenty of time this morning.

Senator **Lautenberg**. The narrowing of the definition, I think, can be construed two ways. One way is to view it as an effort to kind of clean it up; and the other is to view it as an attempt to remove some of the uncertainty that perhaps works to the benefit of the consumer. That is referred to commonly around here as the chilling effect; that is, a firm makes sure that it does not overreach. That is my concern.

I do not know how these polls are interpreted. You interpret them very generously in saying you are sorry that it is not 100 percent. What kind of a poll was this, Mr. Greenberg? I assume it is a reasonable sample?

Mr. **Greenberg**. A Harris Poll, random sample, nationwide.

Senator **Lautenberg**. I am trying to remember how they did my election.

The **Chairman**. I talked with Lou Harris about the poll. As I recall, it was last November or October.

Mr. **Versfelt**. Regardless of the specifics of the poll and whether it was representative or otherwise, Senator, we firmly put ourselves in the camp of those who want the Federal Trade Commission to come out of this legislative process that has been going on for the last 2 years with guidelines which will permit it to go after bad advertising and, at the same time, guidelines which will permit it to know what advertising it should not be meddling with.

Senator **Lautenberg**. Thank you, Mr. Chairman.

Mr. **Weil**. May I just have one moment to follow that up?

Senator **Lautenberg**. It is fine with me. The chairman is the one who is in control here.

The **Chairman**. We are pretty loose today, because we have got plenty of time. We only have one other panel, and hopefully we are not going to have any votes too soon.

Mr. **Weil**. Might I just ask that we keep in mind the distinction between misleading and deceptive on the one hand, and unfair on the other? Our problem is not with misleading and deceptive, although we would like to see it defined in such a way that, as we said in our statement, the Commission is restrained from reading strawman meanings into the ad so that it can then knock them down as being deceptive. That is pretty much the area of our interest there.

Also, that the Commission not proceed even on the basis of deception or misleadingness where there really is no public interest involved, it just really does not matter, there is no injury consequent upon it.

Our problem is more basic with unfairness because that leaves room for a censorial imposition and enforcement of subjectively value-laden decisions, ideologies. So that an ad which is truthful, which does not mislead consumers, but for some ideological reason the FTC thinks this is not a good kind of an ad to go out to the public.

Under unfairness they could then censor on the basis of their own subjective values and philosophies, and that we say is a clear violation of the first amendment.

Senator **Lautenberg**. Yes. There is some risk of that. On the other hand, there is again the occasional extension of power—I do not want to describe it as abuse—the occasional extension of authority that does creep in. I think it is that fine line that we are discussing here today.

Mr. Greenberg?

Mr. **Greenberg**. Senator Lautenberg, we cannot have it both ways. If we are going to have a sophisticated advertising industry and an industry that bases much of its effectiveness on its ability to affect us through our senses, its ability to use subliminal cuts, then there are going to be cases where the FTC—looking at an ad, comparing it to its December 1980 policy statement and going through the three-step process of substantial injury, not outweighed and which could not have been avoided—may find some cases where deception does not really fit. And I see no reason for us to turn ourselves into a pretzel and make bad law by distorting deception.

Mr. **Versfelt**. Mr. Chairman, if I might make a brief comment, I cannot let go by the word "subliminal" in the response just made. There has never been a showing, and we are not speaking here today of the vague concept of "subliminal" advertising. That is not the same thing.

The **Chairman**. What do you mean by "subliminal"? I know what I think it means, but my hunch is that all three of us may mean something different.

Senator **Ford**. Let Mr. Greenberg define it.

Mr. **Greenberg**. I simply mean that advertising can affect us on many different levels; that what we see is not necessarily all of what we get through an ad; and that the medium works on all of our senses and does not just work on the information that is imparted to us.

Senator **Ford**. That sounds like the impression of the law we passed.

The **Chairman**. Go ahead.

Mr. **Weil**. I think whoever started this, exemplified allegedly subliminal advertising as being advertising in which there is one perceivable message being communicated visually and/or audially but at a range, let us say, where only a dog could hear it.

The **Chairman**. Oh, yes, but let us not go into that. That is not what we are talking about. I do not think that is Mr. Greenberg's definition.

Mr. WEIL. Well, then, you may be talking about mood advertising where some people object——

The CHAIRMAN. I think that is more what he means, but not sounds that are below the threshold of audible reception, but still penetrating your mind.

Mr. VERSFELT. Well, so long as that point has been clarified, Mr. Chairman, I am comfortable.

Mr. WEIL. Then let me speak to the mood. This is like saying that it is an unfair practice to have a presenter that the public likes. It is like saying it is an unfair practice to play pleasant music or exciting music in a certain commercial. It is like saying that a politician should not be allowed to use a persuasive voice.

The CHAIRMAN. Is it unfair to give people false expectations?

Mr. WEIL. It is deceptive.

The CHAIRMAN. What?

Mr. WEIL. It is deceptive to give them false expectations.

The CHAIRMAN. Is it unfair? I am not talking about unfairness in the statutory sense. Is that an unfair thing to do?

Mr. WEIL. Any deception is unfair.

The CHAIRMAN. And it is unfair not because you do not know what you are doing, but it is unfair because the people who receive the message are given false expectations?

Mr. WEIL. Well, if that is done deliberately, then there is a deliberate communication of a false message.

The CHAIRMAN. All right. Now what do you think is intended by the advertisements for the lottery in Maryland that I see frequently where you show the absolutely exhilerated winners who receive their $50,000 or $100,000 check, and then you have to play to win. What is that ad trying to tell the hundreds of thousands of people who will win nothing? Is it trying to give them the heightened expectation of a chance of winning?

Mr. WEIL. I really do not know. When you get down to specific facts there, if you want to know what the expectation is that is communicated you would have to do a consumer perception test. I would think that most consumers know that in any form of gambling there are more losers than winners. But they are willing to take the chance knowing that. They are willing to take the chance.

The CHAIRMAN. I will give you a rule of thumb, having watched my children grow up and fortunately they are past the stage now—as a rule of thumb, any toy advertised on television that gives the impression that it will run for any length of time on a battery is misleading. Is that a fair statement?

Mr. WEIL. I do not think so. It depends on what length of time you are talking about. You said any length of time.

The CHAIRMAN. A reasonable length of time. Again I am talking about a toy of movement. If you are talking about something that does not require movement, batteries will last a long time. They do fine in cameras. They do fine in calculators. But to give the impression that it will last a long time—which is what I think the ad intends—it in my mind is misleading; the battery does not have that much power or that much life.

Mr. WEIL. I think it would depend on the particular case, the particular language, and the particular demonstration that is given. Also, I have noticed that most of those ads say that the battery is not even included in the original purchase.

The CHAIRMAN. I understand.

Mr. WEIL. So in other words, whoever sees that ad I think must recognize and realize that they have to supply the batteries, and that batteries are not eternal.

The CHAIRMAN. Your profession has one added advantage over the others that we have been hearing from recently who ask for exemptions or statutory modifications. You have a legitimate claim on the first amendment that the others who want to be exempt from the antitrust laws or whatever do not have.

That is something that all of us, and I think Mr. Greenberg included, are sensitive to. Heaven knows, politicians, especially politicians, are allowed to make the most outrageous statements in campaigns and the Court will protect us. Short of out-and-out fraud, and I am not even sure that is prohibitable, the Court will lean way in our direction. It does not matter if they are in politics or not. On commercial speech they are slightly more restrictive, but they still lean a long direction in letting you say what you want.

What bothers me I guess about all professions, my own included—I am a lawyer—is that, one, we do not want anybody outside of our profession telling us what we can do. They do not understand our problems. Nonadvertisers do not understand your problems; doctors do not understand our problems; and we do not understand doctors problems; and so forth.

I think advertisers will, unless I miss my guess, consciously create ads designed to give the public the impression that they will get more than they get. It is misleading, although it may not be deceptive or unfair under FTC doctrine. Clearly when you first started advertising gas mileages for cars, you did not include the disclosure that mileage was "dependent upon conditions and driver adaptability." Then you would say, "well, those are the EPA figures."

The ads were clearly designed to give the buyer the impression they would get better mileage than you knew they were going to get, and I think that is unfair to them. But I think that is the impression you intended to give them.

Mr. WEIL I am not sure of the EPA, but I think it is a requirement that those figures be given.

The CHAIRMAN. Oh, it is a requirement. All I am saying is that the ads are designed to give the purchasers of the cars the impression that they will get greater mileage than the great bulk of them will get.

Senator FORD. Mr. Chairman, could I comment? You are getting to something there that I understand. You talked about a father awhile ago; that your children were beyond the battery stage. Well, when you get to be a grandfather, it costs you even more.

The CHAIRMAN. They come back again.

Senator FORD. It costs you even more. So I know something about batteries.

But if I understand what you are getting to here particularly on the mileage and the EPA standards, the Government has said they will test them, and then they will tell you what that mileage range is. They are reflecting what we have instructed them to do.

Now if you are going to jump on the ads that are on TV, I think we are going to have to clean up our own house and restructure our people related to what we do. I am not sure I can give the right kind of direction to advertisers on mileage.

The **Chairman**. No. But, Wendell, you and I know what we are talking about. Initially when EPA did the standards they thought that a car under laboratory conditions with wheels running over rollers was an adequate test for running on a road. It turns out it is not.

Senator **Ford**. That is right.

The **Chairman**. In fact, the EPA has changed that. But it was not within 6 months of those coming out that we began to grasp the fact that it was inaccurate. Yet, automobile advertising would give the impression, deliberately, that they are accurate. I think finally the public has come to realize generally, after buying enough cars, that the ads are not right; that you do not get that kind of mileage.

Senator **Ford**. You have a disclaimer on them now.

The **Chairman**. Oh, I understand they have got a disclaimer on them now.

Senator **Ford**. But at the time, it is just like the longer you live the more you learn. At the time, we thought that was right and the EPA was telling us that was the right way to do it, and that was legitimate. We get to the point that what happened 10 years ago, we are still applying that to today. We are finally discovering that maybe drugs, asbestos or sawdust will get in our bodies and cause cancer. Well, we did not know that 30 years ago, but we have got to adjust, I think. This is part of what you all are trying to do.

So I am a little bit troubled when we try to apply EPA standards of 10 years ago to today, or the mileage test.

The **Chairman**. I will give you another one that is not an EPA standard. We are all aware that aspirin is aspirin. Ads will try to give the impression that Bayer is better than St. Joseph's, or St. Joseph's is better. You and I know they are not.

Senator **Ford**. Well, I do not know.

The **Chairman**. The advertisers know that they are not; that aspirin is indeed aspirin, and that a fair portion of it in the Western Hemisphere is made by two companies and sold under a variety of different names.

Senator **Ford**. I still like Tylenol.

The **Chairman**. That is fine.

But is it not fair to say that the advertising is designed to give the impression that one form of aspirin is better than the other, depending upon who the client is?

Mr. **Weil**. It may indeed be, because although the basic chemical might be the same, you get differences in crystalline structure, you get differences in the manufacturing process, the vehicles that carry the aspirin, the——

The **Chairman**. What do you mean "the vehicles"? "Aspirin" generally is "aspirin." We have been through this with the Food and Drug Administration in the debates on the generic issue. Aspirin is aspirin.

Mr. **Weil**. Well, basically chemically. However, the formulation of the particular brand can be quite different. It is possible to have a tableting where none of the aspirin will disintegrate in the system; it will go right out in the feces. It is still aspirin, but that brand——

The CHAIRMAN. Then how do you differentiate between the aspirin that is made by the same company but sold under different names, one of them a trade name and one of them generic?

Mr. WEIL. There is probably no difference.

The CHAIRMAN. And yet the advertising gives the impression that the trade name is a better aspirin.

Senator FORD. What about gasoline?

The CHAIRMAN. I agree.

Senator FORD. What about other things?

The CHAIRMAN. I agree.

Mr. VERSFELT. Senator Packwood, it might be easier to see it if the issue is really defined as one tablet having a certain amount of aspirin, and another tablet having more aspirin; where the issue is, does the tablet that has, for example, 400 milligrams of aspirin provide better relief than an aspirin that has only 275 milligrams of aspirin. That is a proposition which has never been challenged, to my knowledge.

The CHAIRMAN. I am talking about apples and apples.

Mr. VERSFELT. OK.

The CHAIRMAN. I recall when I was a college student I used to work in the summers for Standard Oil of California. I recall going to their warehouse in Portland and seeing hundreds and hundreds and hundreds and hundreds of cases of oil made for Sears, Roebuck sold at a significantly different price. We would try to give people the impression that the oil we were selling at Standard stations was a better and different grade of oil. It was the same oil that we were packaging for Sears. They would sell it at a significantly less price than we would because it was their name.

To me, we were attempting to give the public the impression that the oil that you bought in the Standard station was better than the oil that you bought at Sears, our oil.

Mr. ROGAL. Chairman Packwood, if we have a little time would it be appropriate at this time to mention some of the other provisions in S. 2499? I am thinking about intervenor funding, and the cap on maximum civil penalties.

The CHAIRMAN. Yes. Go ahead.

Mr. ROGAL. I can briefly give you the American Advertising Federation's position on those things. I think they are still before the Congress because of the continuing resolution.

Using S. 2499 as a guide, AAF supports the definition of unfairness which is in section 2.

We support repeal of the intervenor funding provision which is in section 4.

We would support some cap on the maximum civil penalties, but our board and our committees have not decided upon the appropriate cap. We do believe that some cap would be very useful. After all, for a violation of, I believe it is, the Consumer Product Safety Act there is a maximum of $500,000 where life is at stake. Here we are just talking about advertising. So we think that some cap is appropriate.

Senator LAUTENBERG. What do you recommend, Mr. Rogal?

Mr. **Rogal**. I beg your pardon?

Senator **Lautenberg**. You must have some thought in mind.

Mr. **Rogal**. As to a cap?

Senator **Lautenberg**. Yes.

Mr. **Rogal**. Two figures come to mind. Of course facetiously I could say a dollar, but I would certainly think something no greater than $500,000 would be appropriate.

Senator **Lautenberg**. Cumulative? A cumulative cap for a number of violations?

Mr. **Rogal**. Yes. Well, the way the statute reads now it is $10,000 for each violation and each advertisement or each broadcast can be a separate violation.

Senator **Lautenberg**. Could there not be a calculation made that says it is worth it to us from the standpoint of the revenue development process? So, it costs a million; that is not bad, we will make $10 million on that thing.

Mr. **Rogal**. That has been posited before, but it is highly unlikely because a responsible advertiser is not concerned that much about possible civil penalties. The onus of a Federal Trade Commission proceeding reported in a Wall Street Journal, or a New York Times article, and every newspaper in the country picking up that X, Y, Z company has been accused of false advertising is the hurtful thing.

So the idea that simply because the cap exists at a certain level they would go ahead and deliberately falsely advertise I think is not very likely to occur.

Senator **Lautenberg**. Yes, but is it not also true that if the advertiser has not learned a lesson in sufficient fashion after several fines, then the total fine ought to be unlimited? At some point I think they ought to understand that you just will not get past this threshold and get away with it?

Mr. **Rogal**. You have to remember that you can possibly go to jail if you have repeated violations of an order to cease and desist. Once an order to cease and desist is affirmed by a court, it then becomes the order of the court of appeals and criminal contempt is very possible.

There was one proceeding involving Holland Furnace some years ago where I believe the president or somebody——

Senator **Lautenberg**. Then why bother with the cap? It is never going to come into play anyway, because there are other things that are much more threatening. So why bother? If we are having an academic discussion about the issue, we are wasting time. Would that not be the case?

Mr. **Rogal**. I do not think so. I just feel that there are so many small and medium-sized businesses out there that could be hurt by extensive penalties that I just have the feeling that some sort of a cap in line with the caps in other types of Government agencies, violations of the antitrust laws, and violations of the Consumer Product Safety Act, and those types of statutes is in order. After all, this is practically unlimited.

I want to commend the committee on the drafting of section 7, the legislative veto provision. AAF endorses the legislative veto as drafted. I personally feel that the way it is drafted, providing that trade regulation rules will be "recommendations" to Congress, is a step forward.

I might point out, in connection with that, you are all aware that there are three cases before the Supreme Court right now holding—circuit court cases—holding that legislative veto is unconstitutional. Now the possibility that could happen and Congress could lose that oversight control over trade regulation rules, I believe is a further argument as to why this very broad unfairness standard should be limited. I do want to point out that we do support this legislative veto.

We also support the provision of section 8 which forbids requiring affirmative relief in an order to cease and desist until the Commission has conducted an analysis showing that the benefits outweigh the costs.

We support section 9, the amendment which would require that the Commission must have reason to believe that an unfair act or deceptive practice is prevalent prior to instituting a rulemaking proceeding.

We oppose two provisions. We do not believe that the professionals should be exempted from FTC jurisdiction insofar as the FTC's power to eliminate restraints on advertising is concerned. I believe that in some of the proceedings that is the way they started at the FTC. There are other proposals in the antitrust area which we do not comment on. We believe that the Federal Trade Commission should have the power to strike down private or State restraints upon legitimate truthful advertising. So we would oppose any elimination of that jurisdiction.

Finally, we do not believe that the statute, the FTC Act, should be amended to provide that cease and desist orders become final and effective within 60 days. I believe I testified before Senator Ford on this issue about 4 or 5 years ago.

You have to remember that many of the orders of the Federal Trade Commission are not limited to just "stop doing this advertisement." They contain a long list of affirmative requirements that would all have to be accomplished prior to a court review. And thus the amendment would almost remove in certain cases, the benefits of court review because by that time, you could not go back, if the court did hold in your favor, to unscramble it.

Another thing, you would have to ask the court for an order staying the effective date. The courts would be unlikely to do that unless you could prove the likelihood of success. So you would have to try the case right there at the outset. We think that the present situation of orders not becoming final until a court review has been accomplished, if one is filed, should remain the way it is now.

Mr. VERSFELT. Mr. Chairman, just briefly, the American Association of Advertising Agencies is in accord with the positions on the other sections of the bill that Mr. Rogal has just expressed.

Senator FORD. Mr. Greenberg wants to object.

Mr. GREENBERG. I probably do not need to go through the laundry list. Except for agreement on professions, you can just flip their position and you will get CFA's position.

The CHAIRMAN. I have no further questions. Wendell? Frank?

[No response.]

The CHAIRMAN. Gentlemen, thank you.

Mr. **Weil.** Thank you, Mr. Chairman.

Mr. **Rogal.** Thank you, Mr. Chairman.

The **Chairman.** Why do we not start with Mr. Rein, and we will then do Mr. Amschler, Mr. Blum, and Mr. Silbergeld.

STATEMENTS OF BERT W. REIN ON BEHALF OF THE CHAMBER OF COMMERCE, ACCOMPANIED BY FRED BYSET, SENIOR COUNSEL FOR ANTITRUST POLICY; JAMES R. AMSCHLER, CHAIRMAN, FTC/ANTITRUST SUBCOMMITTEE, NATIONAL ASSOCIATION OF MANUFACTURERS, ACCOMPANIED BY HOWARD A. VINE, DIRECTOR, CORPORATE FINANCE, MANAGEMENT AND COMPETITION COMMITTEE; JARED O. BLUM, SMALL BUSINESS LEGISLATIVE COUNCIL, ACCOMPANIED BY THOMAS MORROW, ANTITRUST COUNSEL; AND MARK SILBERGELD, DIRECTOR, WASHINGTON OFFICE, CONSUMERS UNION

Mr. **Rein.** Thank you, Mr. Chairman.

I am Bert Rein. I am a partner in the Washington office of Kirkland & Ellis, and a member of the chamber's council on antitrust policy and its FTC subcommittee.

I am accompanied today by Mr. Fred Byset, who is the chamber's senior counsel for antitrust policy.

The chamber has submitted an extensive statement for the record. The statement reflects the chamber's continued adherence to certain policies it advocated last year, which were explained to this committee on March 19, 1982, and further explained in the deception hearings which were held before Senator Kasten on July 22.

A number of those policies were viewed favorably by this committee in S. 2499. We are here today to summarize what we think is a sensible and balanced program for permanent FTC reform, and to answer any questions you might have. We sincerely hope that this year we will see a resolution of a number of these troubling issues.

The chamber believes that the FTC can play a meaningful role in the administration of national competition policy and the protection of consumers from injurious commercial malpractices. If the Commission's mandate in these areas is appropriately defined by the Congress, the chamber believes that the FTC can retain the confidence of both consumers and the business community. But if the Commission is left free to flipflop between extremes under its current amorphous mandate, it will continue to generate legitimate fear within the business community and unrealistic expectations on the extremist-interventionist fringes of the consumer movement. The result will inevitably be continuing calls for ad hoc legislative intervention, fruitless and costly pursuits of grandiose social planning exercises, and ultimately a general consensus that anything kicked so repeatedly must actually be a political football.

In our prepared statement we discuss in detail a proposal to conform the FTC's unfair-methods jurisdiction to the mandate of the Sherman Act and such other specific guidance the Congress may give by statute. We point out that the absence of antitrust limitations has led the Commission down the fruitless paths of shared monopoly and bigness is badness.

We advocate instead that the Commission focus its unfair-methods' efforts on complex rule-of-reason Sherman Act cases where its economic expertise is especially important and the cease-and-desist powers appropriate.

We are confident that this legislative prescription would both safeguard against Government intrusion in the name of competition and produce the maximum return on enforcement dollars.

Our prepared statement also deals with the second major branch of the FTC's jurisdiction: unfair and deceptive acts and practices. In our view, the FTC has made the concepts of unfairness and deception practically interchangeable, and there is good reason to treat them as a single unit.

A majority of the Commissioners and both Houses of the Congress agreed last year—and apparently still agree—that unfair acts should be defined legislatively as involving substantial consumer injury which is not outweighed by offsetting benefits to consumers or competition and cannot reasonably be avoided by consumers. We believe this is sound policy and we support its codification.

We also support a parallel codification of deception, a step supported by the FTC Chairman, and a step essential to insure that cases precluded under legislative unfairness criteria are not artfully resurrected under deception.

We believe that the three elements which limit unfairness also should limit deception, except in the case of material misrepresentations known to be false or made in reckless disregard of their truth or falsity. Falsehoods and intentionally misleading representations have no place in a well functioning free market, and our legislative proposal would flatly bar them without the need to prove consumer injury or unavoidability.

We see no merit to the argument that criteria which appear to be understandable to all in the context of fairness suddenly become vague and indefinite in the context of deception.

The chamber has special concerns in the area of consumer protection rulemaking.

First, we believe that the unfair acts rulemaking power should not extend to commercial advertising because of the special potential for first amendment abuse when specific facts are ignored.

Second, we recommend that the Commission not be allowed to waste resources on a trade regulation rule without first proving that the alleged unlawful practice is prevalent in the market.

Finally, we continue to urge the repeal of section 5(m)(1)(B), the provision which permits the FTC to seek civil penalties from companies alleged to have violated a cease and desist order injured against someone else in a proceeding in which the accused could not participate. We find no clearer example of due process denied.

We also have substantial concerns over the administration of civil penalties in consumer protection cases. As we point out in our statement, current definitions of violation could lead to billions of dollars of potential penalty liability from a single bulk mailing or publication. We believe this deficiency can be remedied without compromise to effective deterence by setting a maximum penalty of $500,000 for any related series of violations, and thus limiting the risks of coerced settlement.

We appreciate the opportunity to testify on these important subjects.

[The statement follows:]

STATEMENT OF BERT W. REIN FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES

Mr. Chairman and members of the Subcommittee, my name is Bert W. Rein. I am a partner in the Washington office of the law firm of Kirkland and Ellis and also a member of the FTC Subcommittee of the U.S. Chamber's Council on Antitrust Policy. We on the Subcommittee are responsible for assisting in the development of the Chamber's position on issues affecting the Federal Trade Commission. Accompanying me today is Fred Byset, the Chamber's Senior Counsel for Antitrust Policy.

In the Chamber's view, Congress, and this Committee in particular, should act affirmatively to chart the future course of the Commission's administration of Section 5 of the FTC Act. Although widely criticized in recent years, the FTC has a useful role in enforcing the nation's antitrust laws and in protecting the individual consumer against commercial misconduct. The scope of this role, however, should be more precisely defined by the Congress and not be left to the discretion of the individuals who at any given moment constitute the Commission. While the Chamber applauds the emphasis on economic analysis and the respect for market forces brought to the Commission by Chairman Miller and his staff, we cannot ignore the prospect that those contributions may be nullified in the future. We therefore urge the Congress to provide more certain guidance to all future Commissions and to the courts which will review their actions.

Under its vague and undefined Section 5 "unfairness" authorities, the FTC has claimed vast and potentially arbitrary power to intervene broadly in the market. While FTC orders are subject to judicial review, the elusive nature of the "unfairness" concept gives the courts no standard by which to assess the validity of FTC action. Thus, the courts have been largely relegated to a limited review of evidentiary and procedural issues. Generally, as long as the Commission follows prescribed procedures and marshalls some evidence of record to support its position, the ultimate conclusion as to what does or does not "violate" Section 5 is effectively insulated from judicial scrutiny.

Given these inherent limitations on court review under the existing statute, and the political pressure generated on the Commission by the vagueness of its own madate, the need for Congressional action is immense. Congress bears the ultimate constitutional responsibility for FTC actions since the agency is wielding power delegated by statute. As the Commission itself has recently recognized, it is "entirely proper" for Congress to "provide as much guidance as feasible to administrative agencies" in the form of more precise statutory standards for the benefit of both the "regulated" and "regulator".[1] In the same manner, the Chamber also believes it both timely and appropriate for Congress to clarify the broad delegation under Section 5 and thus to set the Commission on a Congressionally-defined and bounded course.

A little more than three years ago, Congress undertook a review of the operations and policies of the FTC resulting in the FTC Improvements Act of 1980. At that time, the Commission, under different leadership, was pursuing regulatory initiatives which intruded into the affairs of industry and commerce from one end of society to the other. In the name of consumerism, the FTC was scrutinizing activities from children's advertising to funerals in an effort to provide cradle to grave protection, while in the area of broader economic regulation, it claimed Section 5 legal authority to restructure entire industries, without antitrust violation, to meet its own notions of market structure and performance.

In response to this situation, the 1980 Improvements Act contained a variety of loosely related provisions ranging from specific restrictions on ongoing proceedings to new agency procedures. Some of the provisions were permanent in nature, while others were effective for only a specific period. The same is true of restrictions in the continuing resolution to provide funding for Fiscal Year 1983; all of the restrictions or procedures are temporary and will expire with the resolution itself.

The 1980 legislation did not attempt to address the more fundamental problem inherent in the FTC's undefined and open-ended Section 5 mandate, and the Chamber has given long study and careful thought to the directions that Congress might give the FTC. We have reviewed the various proposals advanced, and in many cases adopted, in connection with the 1980 Improvements Act and the continuing resolution and have come to the conclusion that reform must go beyond procedure and ad hoc review of individual proceedings. We believe that Congress must now take a hard look at the FTC's basic Section 5 authority in both antitrust and consumer protection and redefine the agency's power by enacting meaningful substantive standards in the governing statute.

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[1] Letter of Commission, per Chairman Miller, to Senators Packwood and Kasten dated Mar. 5, 1982 at pp. 8–9.

The U.S. Chamber, in consultation with other leading business groups, has prepared draft legislation designed to achieve this objective, which we now submit for this Committee's consideration. (See Appendix A.) The concepts incorporated in this draft legislation could provide a sensible, long-term means for revitalizing the FTC in its legitimate regulatory sphere.

In the antitrust area, for example, the FTC's generally repudiated efforts at activist economic regulation reflected, to a large degree, confusion on the part of the agency as to its proper enforcement role. Not wishing merely to duplicate the activities of the Department of Justice and without meaningful guidance from Congress, the FTC during the 1970's began probing the outer bounds of its Section 5 "unfairness"/antitrust authority. This search for a specific mission, unfortunately, led the agency into a series of ill-conceived and adventurous proceedings, such as the cereal and automotive industry cases, which absorbed enormous Commission and private resources and raised widespread concern that the FTC regarded itself as a centralized economic planning agency.

The Chamber's proposed legislation is designed to return the FTC's Bureau of Competition to the mainstream of antitrust enforcement. It would require the agency to observe established Sherman Act principles in Section 5 cases and, in this way, would provide meaningful guidance to the Commission and to reviewing courts. The proposal would reemphasize the role of antitrust, with its focus on market freedom, as the major instrument of competition policy, foreclosing the pursuit of nebulous "social" objectives. In a larger sense, the Chamber's proposal contemplates a long-term accommodation between a Justice Department focused on per se offenses and an FTC focused on complex, rule of reason cases where administrative expertise and remedies are particularly appropriate.

Similarly, in the consumer protection area, the Chamber's proposed legislation incorporates specific standards to govern the FTC's exercise of its "unfair or deceptive acts or practices" jurisdiction. The proposal essentially leaves intact the FTC's authority to strike down falsehoods, reckless claims, or practices that are intentionally misleading. Such conduct has no place in our free enterprise sytem and the FTC, unless the Chamber's draft language, would be fully empowered to prevent it.

When, however, the Commission moves beyond reprehensible conduct and seeks instead to attack business practices because of an alleged adverse impact on consumers, the Chamber's proposal would provide it with substantive guides to bring agency action within proper bounds. The Commission should intervene on an impact basis only when the alleged injury to consumers is substantial and not reasonably avoidable and then only when the benefits of government intervention outweigh the costs which such intervention would impose on consumers and the competitive systems. Significantly, these guideposts in the Chamber's proposal are the very same criteria that the FTC itself recommended last year as appropriate elements in a more precise statutory definition of "unfairness." [2] The Chamber thus basically accepts the Commission's own formulation which, we believe, expresses the appropriate statutory limits of the agency's consumer protection jurisdiction.

Consistent with and complementary to our substantive proposal, the Chamber is proposing two additional modifications to Section 5. First, we believe Congress should make clear to the FTC that its consumer protection jurisdiction does not overlap the jurisdiction of specialized regulatory agencies and should focus on commercial practices rather than health or safety problems.

Second, we urge revisions in the Commission's authority to collect civil penalties from alleged violators of orders and rules. As to penalties from companies accused of violating orders entered against other companies under Section 5(m)(1)(B), we recommend outright repeal. Other civil penalty authority—Sections 5(1) and 5(m)(1)(B)—should be subjected to a statutory maximum of $500,000 for any related series of violations. Without a limit, alleged violators are under such intimidation that few are willing to test their cases on the merits. Most settle out of court on the best terms they can get.

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[2] Letter of Comm., per Chairman Miller, to Senators Packwood and Kasten dated March 5, 1982 at pp. 7-9. Only Commissioner Pertschuk did not share the view of his fellow Commissioners that new statutory standards would be appropriate. Nonetheless, even he agreed that should Congress adopt new legislation concerning "unfairness", it should properly include the concepts of substantiality, unavoidability, and cost-benefit analysis.

As this Committee concluded in approving S. 2499 in the 97th Congress, two other permanent amendments to the FTC Act would also be appropriate: (1) apply the civil investigative demand (CID) procedures now provided for investigations of unfair and deceptive practices to investigations under all statutes enforced by the Commission; and (2) provide that the Commission may issue a notice of proposed rulemaking only where it has reason to believe that the challenged conduct is prevalent in the market.

I. CONTINUATION OF CERTAIN PROVISIONS OF FTC IMPROVEMENTS ACT OF 1980

As legislation arising in part out of the appropriations process, several of the provisions in the FTC Improvements Act of 1980 and renewed in the Continuing Resolution were tied to the expenditure of agency funds during designated fiscal periods. Therefore, absent Congressional action, certain key aspects of the 1980 Improvements Act will expire at the end of the current fiscal year.

The U.S. Chamber strongly supported many of these provisions during the hearings leading up to the enactment of the 1980 legislation. The Chamber continues this support and urges that the provisions identified below be incorporated in the FTC's organic statute.

The reasons justifying the original adoption of these provisions in the 1980 Improvements Act are fully set forth in the hearings and debates that preceded that legislation and need not be repeated here. Experience during the least several years under the new legislation, however, has fully confirmed their appropriateness.

Specifically, the National Chamber believes that the following portions of the FTC Improvements Act of 1980 should now be made a permanent part of the FTC's governing statute:

1. *Intervenor funding limitations.*—While all interest groups, and particularly consumers, should be represented in agency proceedings, Congress found that there had been serious abuses in the FTC's administration of intervenor funding, including selective disbursement to groups in agreement with the FTC's position, staff preparation of written statements for so-called "public" witnesses, and funding of unqualified individuals and groups. Congress adopted important safeguards in this area in the 1980 Improvements Act which should now be continued.

2. *Prohibition of "unfairness" rulemakings with respect to commercial advertising.*—The Chamber has consistently criticized the FTC's use of rulemaking to "legislate" broadly with respect to so-called "unfair" acts and practices. "Unfairness" is an elusive and amorphous concept which becomes even more tenuous when pursued in an unfocused rulemaking process. As the children's advertising and similar proceedings have demonstrated, "unfairness" rulemaking with respect to commercial advertising is particularly suspect and raises issues of constitutional dimension. Congress prohibited such activities in the 1980 Act, a prohibition that should now be incorporated on a permanent basis.

3. *Congressional oversight.*—The current authorization act contemplates regular Congressional oversight of the Commission, including pre-enforcement review and possible veto of the agency's rules. We have supported this concept in the past as an effective mechanism for insuring compliance with Congressional intent, and we urge renewal—not inconsistent with constitutional considerations and a proper balance of legislative and executive authority.

4. *Trademark cancellation.* We also generally support one other aspect of the 1980 Improvements Act and the Continuing Resolution, i.e., limitations on FTC participation in trademark cancellation proceedings, which is also scheduled to lapse at the end of the current fiscal year. Trademark cancellation proceedings concerning whether a mark has become a "common descriptive name" can be exceedingly long and complex. FTC involvement in such proceedings represents a waste of the Commission's scarce resources, especially as affected industry members already have a strong incentive to protect their own interests in such matters.

While Congress should take prompt affirmative action with respect to each of these items, the Chamber does not believe that continuation of these 1980 Improvements Act provisions is a substitute for providing substantive content to the Section 5 standards and meaningful direction to the FTC in carrying out its antitrust and consumer protection missions.

II. CLARIFICATION OF THE FTC'S POWER TO PREVENT "UNFAIR METHODS OF COMPETITION"

The first important aspect of the Chamber's proposed legislation concerns FTC antitrust enforcement under its Section 5 authority to prevent "unfair methods of competition." The Commission has operated under this broad and essentially unrestricted "unfair methods" mandate for almost seventy years. Although originally interpreted in a manner generally consistent with the mainstream of antitrust enforcement, this authority has been used repeatedly by the FTC during the last ten years to justify new programs of activist regulatory intervention in the nation's economy.

The crux of the problem is the statute's lack of objective standards for determining what is and is not an "unfair method of competition." Because of this critical failure, the FTC has had relatively little meaningful judicial review and has often felt free to attempt to impose on the business community the policy preferences and social priorities of incumbent Commissioners and staff. Moreover, the lack of substantive limitations in the Commission's statutory authority has exposed the Commission to pressure to remedy any economic condition which a politically powerfull faction regarded as an "evil."

The Chamber's proposed legislation would remedy this situation by incorporating into Section 5 of the FTC Act the established body of judicial precedent under Section 1 and 2 of the Sherman Act. By thus directing the FTC to adhere to Sherman Act standards as defined by the Court, the Chamber's proposal would effectively eliminate the FTC's roving antitrust "unfairness" mandate.

A. The need for objective standards for determining "unfair methods of competition"

In vesting the FTC in 1914 with jurisdiction to prevent "unfair methods of competition," Congress acted in the context of, and in response to, prior judicial decisions under the Sherman Antitrust Act. The Federal Trade Commission Act was passed in reaction to the Supreme Court's adoption of the "Rule of Reason" standard for judging the legality of *Standard Oil Co.* v *United States,* 221 U.S. 1 (1911). The Standard Oil decision was not well received in Congress where it was viewed as a weakening of the Sherman Act prohibitions. Accordingly, Congress invested the FTC with broad "unfair methods of competition" authority to counteract the perceived potential for judicial emasculation of the Sherman Act.[3]

Obviously, much has changed since 1914. Sherman Act enforcement has not withered away, but has instead evolved over the years into a rich and substantial body of precedent which defines, with reasonable predictability, our national competition policy. Indeed, expansive judicial interpretation of pertient Sherman Act doctrines[4] have made the statute a very powerful and adaptable weapon against all forms of anticompetitive abuse.

This evolution of Sherman Act principles has essentially mooted the original 1914 Congressional concerns that gave rise to the FTC's vague "unfair methods of competition" authority. At the same time, the intervening years—and especially the decade of the 1970's—have witnessed a series of dubious FTC proceedings that manifest the dangers inevitably created by an undefined and open-ended legislative mandate. These proceedings include:

1. *"Shared Monopoly Cases"* in which the FTC attacks industry structure arising, without collusion, in the market and seeks to reshape industries to meet the FTC's regulatory notions of optimum restructuring. The Chamber is acutely aware that the *Cereal* case[5] ended in a precedential "draw" with three Commissioners refusing to foreclose a rerun in a more propitious political climate.
2. *"Bigness is Badness Cases"* in which the FTC attacks large companies on social grounds and seeks to limit their growth and efficiency advantages. The now terminated, but never legally repudiated, oil industry proceeding and automotive investigation are recent examples.[6]
3. *"Noncollusive Parallelism Cases"* in which the FTC attacks Commercial practices arising pervasively, without collusion, in the free market and attempts to dictate better methods of doing business.

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[3] *See* Averitt, *The Meaning of "Unfair Methods of Competition" in Section 5 of the Federal Trade Commission Act,* 21 B.C.L. Rev. 227, 228–38 (1980).

[4] *See, e.g.,* Interstate Circuit, Inc. v. United States, 306 U.S. 208 (1939) (providing a very relaxed standard of proof for the conspiracy or combination element of Sherman S1); *United States* v. *Container Corp.,* 393 U.S. 333 (1969) agreement to exchange price information invalidated under Sherman Sec. 1 despite minimal anticompetitive effect.)

[5] *Kellogg Company, et al.* 3 CCH Trade Reg. Rep. 21,899 (FTC Docket 8883), complaint dismissed by order dated January 15, 1982 with separate or dissenting statements by Commissioners Clanton, Pertschuk and Bailey.

[6] *Exxon Corp. et al,* 3 CCH Trade Reg Rep. Par. 21,866, (FTC Docket 8934), complaint dismissed September 16, 1981; See CCH Trade Reg. Rep. 10,438 (reporting May 13, 1981, FTC Press Release that announced closing of five-year industry-wide antitrust investigation of automobile industry.)

The *Ethyl* case[7] now before the Commission is an example of this activity as was the earlier *Boise Cascade* (Plywood case.)[8]

4. *"New Nonstatutory Offense Cases"* in which the FTC attacks market practices which Congress specifically chose to exempt from antitrust coverage. In the *Times-Mirror* case, for example, the Commission sought to use Section 5 to extend the Robinson-Patman Act to services not covered by that statute.[9]

5. *"Competitive Balancing Cases"* in which the FTC attacks market practices in one industry because they may distort the FTC's model of competition in another. Thus, the FTC's order in *Rueben H. Donnelley* (Airline Guide) attempted to restrict the discretion of the publisher to improve competitive balance in the airline industry. While that particular excess was overturned by the Second Circuit even under Section 5, the FTC continues to pursue similar theories in other proceedings.[10]

While this list is by no means exhaustive by category or case, it clearly illustrates the pressing need for legislation to provide substantive content to the FTC's "unfair methods of competition" jurisdiction.

Equally significant, the lack of objective standards governing the FTC's antitrust enforcement also serves to insulate the agency from effective judicial review. Without Congressional guidance in the FTC's organic statute, the courts have traditionally given the FTC latitude in proscribing trade methods under the elusive "unfairness" rubric.[11] Confining their review principally to substantial evidence and procedural fairness issues, the courts have thus been unable to curb effectively the FTC's attempts at activist regulatory intervention.

In sum, the premise upon which Congress in 1914 invested the FTC with its "unfair methods of competition" jurisdiction is no longer valid. The development and expansion of Sherman Act doctrine over the years has essentially eliminated the need for the FTC's elastic, catch-all "unfairness" mandate. At the same time, the lack of substantive content in the organic statute has allowed the FTC to engage in intrusive economic regulation at the whim of transient majorities and unchecked by meaningful judicial review.

B. The effect of the Chamber's proposed legislation on FTC antitrust enforcement

The Chamber's proposed amendment to Section 5(a) provides substantive content to the statutory prohibition of "unfair methods of competition" in two ways. First, it adopts the established body of judicial precedent developed under Section 1 and 2 of the Sherman Act. And second, it incorporates all of the categories of practices that Congress may specifically define to be unfair.[12]

The proposed amendment thus returns the FTC to the mainstream of antitrust enforcement. Instead of being guided only by its own fluctuating perceptions of "fairness," the agency will have to exercise its "unfair methods of competition" authority in accordance with the dictates of Congress and/or established Sherman Act principles as developed by the courts.

At the same time, the Chamber's proposal will not frustrate any legitimate antitrust enforcement objectives that Congress believes the FTC should pursue. Thus, the amendment will have no impact on the FTC's separate statutory authority to enforce the Robinson-Patman Act and Sections 3, 7 and 8 of the Clayton Act. Further, the amendment expressly confirms and preserves the FTC's long-recognized power to proceed against all Sherman Act violations.[13]

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[7] *Ethyl Corp., et al.*, 3 CCH Trade Reg. Rep. Par. 21,856 (FTC Docket 9128), appeal from 8/12/81 Initial Decision finding Section 5 violation now pending before full commission.

[8] *Boise Cascade Corp.*, 91 F.T.C. 1 (1978), *rev'd sub nom. Boise Cascade Corp. v. FTC*, 637 F. 2d 573 (9th Cir. 1980).

[9] *Times Mirror Co.*, 3 CCH Trade Reg. Rep. Par. 21,871 (FTC Docket 9103), consent order to cease and desist announced September 25, 1981 but subsequently rejected by Commission 3 CCH Trade Reg. Rep. Par. 21,937. *See Perpetual Federal Savings & Loan Ass'n*, 90 F.T.C 608, 648 (1977), *order withdrawn*, 94 F.T.C. 401 (1979), in which the FTC attempted to use Section 5 to extend Clayton Section 8 and exercise jurisdiction over Bank-S&L director interlocks.

[10] *Reuben H. Donnelley Corp.*, 95 F.T.C. 1 (1980), *rev'd sub nom. Official Airline Guides v. FTC*, 630 F.2d 920 (2d Cir.), *cert. denied*, 101 S.Ct. 1362 (1981). *See Ford Motor Co.*, FTC Docket 9113, and *General Motors Corp.*, FTC Docket 9114, in which the FTC has attacked under Section 5 automobile manufacturers' business judgment in purchasing advertising in order to improve competition in rental and leasing industry.

[11] *E.g., FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233 (1972) upholding FTC's authority to make ad hoc judgments of "fairness" concerning practices which violate neither the letter nor the spirit of the antitrust laws.

[12] Congress has already defined a number of acts and practices to be "unfair methods of competition" in the Wool Products Labeling Act (15 U.S.C. S 68 et seg.), the Fur Products Labeling Act (15 U.S.C. S 69 et seg.), and the Textile Fiber Products Identification Act (15 U.S.C. S 70 et seg.). The Chamber's proposed amendment would carry forward such definitions without the need for further conforming changes.

What the proposed amendment does eliminate, however, is the potential for agency abuse that currently exists under the vague and otherwise contentless "unfair methods of competition" language. In particular, the amendment will prevent future FTC excesses based upon the so-called "incipiency," "spirit," and "S&H public values" theories.

Under the "incipiency" doctrine, the FTC claims the authority to stop acts and practices which, when full blown, would violate the Sherman and Clayton Acts.[14] How close to a completed violation a respondent must be before this incipiency theory can apply, however, is wholly undefined. While such an approach may have made sense in 1914 when the reach of the Sherman Act was in doubt, today this doctrine provides the FTC carte blanche to attack legitimate, procompetitive business conduct based on mere speculation as to future developments. Current interpretations of Section 1 of the Sherman Act already provide a means to redress facilitating practices that might lead to trade restraints, while both the "conspiracy to monopolize" and "attempt to monopolize" provisions of Section 2 can be used effectively to halt anticompetitive behavior at an early stage. Accordingly, elimination of the open-ended "incipiency" theory under FTC Section 5 will reduce the potential for abuse that now exists without sacrificing any legitimate enforcement objective.

In the same manner, the so-called "spirit" application of Section 5 under which the FTC may "fill in the gaps" and prohibit conduct that violates the "spirit" or policy, but not the letter, of other antitrust laws is both largely unnecessary and subject to misuse. The Sherman Act, as it has envolved over the years, provides adequate authority to prevent unreasonable restraints of trade and fully embodies a policy of free and open competition. The undefined "spirit" doctrine permits the FTC to ignore specific statutory and/or judicially prescribed elements and, in effect, to create entirely new substantive offenses. If any "gaps" in fact exist which need to be "filled in," such a task is best left to the Congress.

Finally, the proposed amendment would effectively overrule the Supreme Court's suggestion in the *S&H* case[15] that the FTC can proscribe conduct as an "unfair method of competition" based solely on unarticulated and undefined "public values," even though such conduct poses "no threat to competition within the precepts of the antitrust laws" (405 U.S. at 244-45). Such overbroad delegation of discretionary authority, by its terms has nothing to do wigh legitimate competition and smacks instead of centralized economic planning.

In summary, the Chamber's proposed amendment will not affect the FTC's traditional jurisdiction to enforce the Sherman, Clayton and Robinson-Patman Acts. It will, however, appropriately define the boundaries of such jurisdiction and preclude the FTC from regulation legitimate business conduct based solely on the agency's own peculiar "fairness" notions.

C. The FTC's antitrust enforcement role under the Chamber's proposed legislation

The Chamber strongly supports soundly administered antitrust enforcement. Since its inception, the FTC has shared concurrent enforcement jurisdiction with the Department of Justice to redress Sherman Act and other antitrust violations. While this situation will continue under the Chamber's proposed legislation, the FTC's role in antitrust enforcement need not merely duplicate the Justice Department's efforts. Indeed, the Chamber's proposal will lay the foundation for a sensible long-term division of Sherman Act responsibilities between these two agencies.

Enforcement activity by the Antitrust Division tends to focus principally on "hard core," per se types of violations. Only the Justice Department can seek criminal sanctions under the Sherman Act and the Department has recognized a responsibility to devote a substantial portion of its resources to the pursuit of criminal anticompetitive conduct. The Department is thus somewhat constrained in undertaking litigation of the more complex, economically-oriented issues that can arise under a full-scale rule or reason analysis.

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[13] *E.g., FTC v. Beech-Nut Packing Co.*, 257 U.S. 441, 453 (1922) (Sherman Act is "declaration of public policy to be considered in determining what are unfair methods of competition"); *FTC v. Cement Institute*, 333 U.S. 683, 690 (1948) (expressly holding that FTC may condemn and suppress Sherman Act violations under FTC Act Section 5.)

[14] Such "incipiency" authority has been recognized by the Supreme Court. *E.g., FTC v. Cement Institute*, 333 U.S. 683, 693 (1948); *FTC v. Motion Pictures Advertising Service Co., Inc.*, 344 U.S. 392, 394-95 (1953). In doing so, however, the Court indicated that it was executing the clear legislative intent of the 1914 Congress. *See, e.g.*, MacIntyre & Volhard, *The Federal Trade Commission and Incipient Unfairness*, 41 Geo. Wash. L. Rev. 407, 414-15 (1973). In 1914, of course, there was a perception that the Sherman Act's proscription of monoply and trade restraints was in danger of being judicially weakened—a perception that subsequent developments have proved to be unfounded.

[15] *FTC v. Sperry & Hutchinson Co., 405 U.S. 233 (1972).*

Under the Chamber's proposed amendment to Section 5, the FTC's enforcement efforts can appropriately complement the Justice Department's activities and be channeled toward areas where the agency's expert economic resource will be most profitably utilized. The FTC will be able to undertake a detailed reexamination of the economic underpinnings of various antitrust theories and help rationalize this area of the law. Similarly, the FTC can bring enforcement actions under established Sherman Act standards to test the competitive effects of new business practices and conduct as they emerge. In such cases, where the practice at issue is either completely new or perhaps previously untested, the cease and desist remedies available to the FTC, which operate only prospectively, are particularly appropriate.[16]

The Chamber's proposal also provides inherent flexibility that will allow the FTC and Congress to work together to ensure that national antitrust objectives are fully realized. To this end, the proposed amendment contemplates that Congress, based on the recommendations and analyses of the FTC, can statutorily define any new category of conduct to be an "unfair method of competition." In such cases, however, it will be the considered judgment of elected representatives that controls, rather than the political and social preferences of a majority of unelected Commissioners.

III. CLARIFICATION OF THE FTC'S "UNFAIR OR DECEPTIVE ACTS OR PRACTICES" AUTHORITY

The second significant feature of the Chamber's legislative proposal concerns the FTC's exercise of its Section 5 "unfair or deceptive acts or practices" authority. In this connection, the Chamber carefully considered several alternative formulations that attempted to define prohibited acts and practices by specific category and type. However, as Congress itself concluded when it enacted the Wheeler-Lea amendments to the FTC Act, such an approach would be unworkable from any practical standpoint. As in the case of "unfair methods," the Chamber's proposed revision of the "acts and practices" language attempts to provide overall direction to the FTC and to define the limits of intervention in consumer protection matters.[17]

Under the current statutory formulation, the FTC's consumer protection jurisdiction extends to acts or practices that are "unfair or deceptive." Since this language was added to Section 5 in 1938, the Commission has made great strides in eliminating from the marketplace conduct that is "deceptive" in the traditional common law sense. Its premise has been that the free flow of accurate consumer information is essential to the competitive process and necessary for the efficient operation of markets—a premise few would dispute. There is no arguing with the proposition, for example, that intentional or reckless misrepresentation of a product characteristic should be enjoined.

More recently, however, the FTC has gone significantly beyond traditional concepts of deception, all of which involve some element of improper motive or intent, in invoking its Section 5 "acts and practices" jurisdiction. The Commission has asserted authority under the "unfair or deceptive" rubric to reach conduct which, regardless of intent or motive, is merely alleged to have an adverse impact on consumers. In moving away from traditional deception to more subtle questions of consumer injury, the Commission is once again left without meaningful standards to guide its actions. All too often, the agency has used subjective perceptions of consumer impact as an excuse to embark upon experiments in social activism. One recent example of the problems that can arise from the Commission's elastic application of its "unfair or deceptive" authority is the discredited, although technically still pending, product standards trade regulation rule.[18] The origins of this proceeding lie in legislation introduced in both the 94th and 95th Congresses by Senator Abourezk calling for federal regulation of the nation's product standards system. Although lengthy Senate hearings were held, the legislation remained stalled in a Senate Subcommittee, while a similar bill in the House did not even muster hearings. Despite this demonstrated absence of Congressional interest, the FTC took it upon itself to attempt to impose almost identical regulation of the standards process by a trade regulation rule.

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[16] As the Commission itself has observed, an agency "equipped with economic expertise" and "whose authority is limited to the issuance of prospective, nonpunitive orders to cease and desist" is especially able to adjudicate "sensitive issues" that may arise in more esoteric aspects of antitrust enforcement. Letter of Comm., per Chairman Miller, to Senators Packwood and Kasten dated March 5, 1982 at p. 5.

[17] The first minimal step with respect to the FTC's "unfair acts or practices" authority, of course, has been discussed earlier and concerns proposed legislation to make permanent the temporary provisions of Section 11(b) of the 1980 Improvements Act which prohibit the FTC from initiating new Magnuson-Moss rulemaking to regulate commercial advertising as an "unfair act or practice." Given the significant First Amendment considerations that exist in this area, "unfairness" is simply too vague a concept to be used in regulating advertising. In addition, broad general rules, as opposed to case-by-case adjudication, should be employed only when necessary for effective regulation. As said last year in Senate Report 97-451, "the Commission should not initiate a trade regulation rulemaking where isolated and insignificant violations have occurred." In short, broad rules should be adopted only when the Commission establishes that the alleged violation is prevalent in the marketplace.

The key issue raised by the standards proceeding in that our elected representatives, when presented with the opportunity, chose not to create laws in the area of voluntary standards setting. Nonetheless, the unelected FTC, insulated from responsibility to voters, tried to use its "unfairness" authority and the administrative process to accomplish the very same end.

Another controversial example of the FTC's expansive use of its "unfair or deceptive acts or practices" jurisdiction is the infamous children's advertising proceeding.[19] The Staff Report that recommended prohibition of televised advertising to young children offered three "justifications" for condemning such advertising as "unfair or deceptive," i.e., (1) "the striking imbalance of sophistication and power" between advertisers and children; (2) the "manipulative—as opposed to informative—nature of the advertising"; and (3) the "unfairness of putting parents to a choice * * * between purchasing products advertised to children on television and enduring the conflict that goes with a refusal to buy the products." The first two of these "justifications," however, would apply to almost any advertising as the advertiser always possesses more "sophistication and power" than the average consumer and always hopes that his commercial message will "manipulate" the consumer, if that means inducing the consumer to make a purchase. As for the third "justification," the FTC's intrusion into parental supervision of children aptly earned the agency its pejorative nickname of "National Nanny."[20]

A third example of misguided "acts or practices" rulemaking is the FTC's proceeding against vocational schools, which industry had been criticized because of the sharp practices of a small number of operators.[21] Despite concerted efforts by both industry associations and state authorities to eliminate such abuse, the FTC nonetheless initiated a broad rulemaking designed to change the basic economics and business methods of the entire industry. In so doing, the Commission gave no consideration to the impact of its proposed action either on the many non-offending small businessmen or on the students themselves who, under the FTC's proposal, would have had to bear substantially increased tuition costs.[22] Had an appropriate cost-benefit analysis been undertaken, the vocational schools rulemaking would undoubtably have had a significantly narrower and more appropriate focus.

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[18] The FTC announced its proposed trade regulation rule concerning standards and certification on December 7, 1978 (43 Fed. Reg. 57269). The new rule was to have become Part 457 of 16 CFR and would have made it both an "unfair method of competition" and "an unfair or deceptive act or practice" for any standards developer, certifier or marketer to violate its provisions. At the urging of the U.S. Chamber and other responsible business representatives Congress enacted Section 7 of the FTC Improvements Act of 1980 prohibiting the Commission from promulgating a trade regulation rule concerning standards or certification activity under its Magnuson-Moss authority. Nonetheless, the Commission has kept the standards rulemaking alive under a different statutory provision of the FTC Act. See BNA Antitrust & Trade Reg , No. 987 at A-19 (October 30, 1980).

[19] The FTC published a formal announcement on April 27, 1978 initiating a trade regulation rule proceeding to deal comprehensively with the entire area of television advertising to children (43 Feg. Reg. 17967). The Congress quite properly terminated this exercise as inappropriate social engineering when it adopted Section 11 of the 1980 Improvements Act prohibiting promulgation of any rule with respect to such advertising under the Commission's "unfair acts or practices" jurisdiction.

[20] Another example of the FTC's overzealous efforts to regulate the field of commercial advertising under its expansive notions of "unfairness" and "deception" is the "Proposed Rule Concerning Advertising for Over-the-Counter Drug," announced November 11, 1975 (40 Fed. Reg. 52631). Under this proposal, all advertising for OTC drug products would have been limited strictly to labeling language approved by FDA, thus turning television commercials for such products into a dry recitation of ingredients, warnings, etc. The Commission properly terminated this unwise effort, after several years of costly proceedings, on May 1, 1981 (46 Fed. Reg. 24584).

[21] The FTC issued its "Proprietary Vocational and Home Study Schools" trade regulation rule as Part 438 of 16 CFR on December 28, 1979 (44 Fed. Reg. 32207). The rule, however, was subsequently overturned by the court of appeals in Katherine Gibbs School v. FTC 612 F.2d 658 (2nd Cir. 1980).

[22] See Ellis, *Legislative Powers: FTC Rulemaking* in *The Federal Trade Commission Since 1970* at 177 (Clarkson & Murised. 1981).

The Commission itself has recognized the problems inherent in its undefined "unfair or deceptive acts or practices" authority when used outside the area of traditional deception and has, on several occassions, issue policy statements attempting to clarify the issue.[23] In December of 1980, for example, the Commission submitted of this Committee a lengthy "Statement of Policy" concerning the scope of its consumer unfairness jurisdiction.[24] The Commission expressly reaffirmed that Policy Statement in a March 5, 1982 letter to Senator Packwood and Kasten and has further suggested that formal codification of the principles articulated in the Statement would be appropriate at this time.[25]

In both its March 5, 1982 letter and the December 1980 Policy Statement, the Commission identified the concept of "consumer injury" as the primary focus of the agency's authority to prohibit non-deceptive trade practices on "unfairness" grounds. At the same time, the Commission acknowledged that the consumer injury criteria does not mean that every consumer injury is legally "unfair." Rather, to justify a finding of unfairness, the injury must also satisfy the following three tests:

1. The anticipated injury must be substantial and involve economic or monetary harm, rather than subjective harms such as emotional distress or offenses to taste or social belief;
2. The injury must not be outweighed by any countervailing benefits to consumers or competition that the practice produces; and
3. It must be an injury that consumers themselves could not reasonably have avoided.

The U.S. Chamber's legislative proposal simply takes the Commission at its word and defines unfair or deceptive acts or practices under Section 5 to be those which: "directly cause or may foreseeably result in substantial economic injury to consumers and such injury is neither reasonably avoidable by consumers themselves nor outweighed by countervailing benefits to consumers or competition. * * *"

The Chamber's proposal does not intend to impair the FTC's authority to condemn and prevent actual "deception." Falsehoods and intentionally misleading representations have no place in a well-functioning free market. By its very nature, such fraudulent behavior is intended to inflict and does inflict substantial injury and cannot be reasonably avoided by consumers. To clarify our intent, we propose that the definition of unfair or deceptive acts or practices also include those which: "consist of material representations known to be false or made in reckless disregard of their truth or falsity."

With respect to the more elusive category of acts and practices which are alleged to be "unfair or deceptive" based solely on claims of adverse consumer impact, however, the Chamber's proposed amendment codifies the FTC's most recent pronouncements that "substantial" injury is an essential element of such a violation. It insures that the FTC's limited enforcement resources will be spent on matters of real economic significance, and not wasted on non-existent trival or merely speculative harms.

The Chamber's proposal also incorporates the concepts of "reasonable avoidability," as well as a basic cost-benefit analysis, as part of the broader assessment of consumer impact. Each of these facts was expressly identified by the Commission in its letter to this Committee as an appropriate predicate to the exercise of its "acts or practices" authority over "unfair" conduct.[26] By incorporating these elements in the organic statute along with the fundamental "substantial injury" test, both the public and reviewing courts can be sure that the key criteria articulated by the Commission will be given the force of law and cannot be ignored by the agency in the future.

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[23] See, e.g., Statement of Basis and Purpose of Trade Regulation Rule 408, Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, 29 Fed. Reg. 8324, 8355 (1964).

[24] Letter of Comm., per Carol M. Thomas, Secretary, to Sen. Wendell H. Ford and Sen. John D. Danforth dated December 17, 1980.

[25] Letter of Comm., per Chairman Miller, to Senators Packwood and Kasten dated March 5, 1982.

[26] While the Commission's letter of March 5, 1982, suggests that a highly quantitative cost-benefit analysis may not be appropriate in every case, the analysis should at least "take into account cost related to a prospective remedy, including but not limited to direct cost to the parties, increased paperwork and regulatory burdens, reduced incentives for innovation and capital formation and like matters." (Id. at p. 8.)

IV. ELIMINATION OF OVERLAPPING REGULATORY JURISDICTION

The third and final element of the Chamber's proposed legislation deals with the FTC's increasingly vexations use of its Section 5 "acts or practices" authority as a backstop for the perceived deficient performance of other agencies or, in some cases, even of Congress. Rather than focusing its energies on the commercial sales and marketing issues which are its special province, the FTC has attempted to extend its consumer protection jurisdiction to issues such as product design, safety and environmental effect which generally fall within the appropriate competence of other specialized regulatory bodies. In other instances, even though Congress may have determined not to act with respect to a particular area, the FTC has been all too willing to intervene and impose its own regulation under color of the Section 5 "acts or practices" authority.

In certain respects the children's advertising proceeding contained a strong undercurrent of this sort of Commission attitude. To the extent the proceeding focused on sugared food products, the attack was motivated not so much by any concern for deceptive or misleading advertising, but rather by the unarticulated notion that sugared foods are simply bad for children. Because even the Commission recognized that it had no power to banish such products from the grocery shelf by administrative fiat, it nonetheless tried to do the next best thing by prohibiting manufacturers from advertising the products' existence. While the FTC may properly control abusive marketing practices, it should not be in the business of determining whether a product is fundamentally good or bad and thereby usurping consumer choice.

Similarly, the Commission has initiated a number of proceedings which, although technically cast in terms of advertising and marketing practices, actually turn on issues of basic product design. Thus, the agency has engaged in litigating the safety of tractor gas tanks[27] and has recently obtained a consent order that requires warning stickers on new jeep vehicles advising of potential handling and driver control problems.[28]

In other instances, the FTC has stepped in despite Congress' judgment that a particular type of regulation is either unwise or unnecessary. In the Fair Debt Collection Practices Act (15 U.S.C. Secs. 1682 et seq.), for example, Congress expressly exempted attorneys and certain retailers from coverage of the statute. Despite this explicit statement of Congressional intent, the FTC has used its Section 5 "acts or practices" authority to extract consent orders from exempted individuals and businesses which essentially duplicate the statutory requirements. Such overreaching by the Commission is particularly inappropriate in this case, where Congress has already provided a mechanism in the statute for yearly reports and recommendations from the agency to permit legislative modification when and if necessary. Under Section 5, however, the Commission was able to short-circuit this process and effectively "legislate" its own ad hoc repeal of the statutory exemptions.

The Chamber believes that Congress never intended to make the Commission an all purpose consumer protection agency. Congress has established specialized regulatory bodies with appropriate competence, such as the National Highway Traffic Safety Administration, the Consumer Product Safety Commission, and the Environmental Protection Agency, to deal with complex product design, safety and environmental problems. Therefore, it is inappropriate for the Commission, acting in the name of consumer protection, to invade areas which Congress has determined either to exempt or to commit to the specific jurisdiction of one of the more specialized regulatory authorities.

The Chamber's proposed legislation would help to alleviate this problem by prohibiting FTC exercise of its Section 5 "acts or practices" powers with respect to conduct that is authorized by federal statute or subject to the direct regulatory authority of another federal agency. In this way, the proposal would eliminate possible jurisdictional conflicts and prevent Commission interference in matters best left to the expertise of Congressionally-established specialized agencies. Perhaps most important, it would also give the Commission clear direction to focus its energies on traditional marketing issues, rather than try to play the role of universal consumer protector.

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[27] *International harvester,* FTC Docket 9147, concerning "fuel geysering" problem of farm tractors. ALJ found past but corrected violation and declined to enter cease and desist order, 43 ATTR 268 (7/29/82).

[28] *American Motors Corp.,* 3 CCH Trade Reg. Rep. Par. 21,890, consent order to cease and desist announced November 10, 1981.

V. REVISIONS IN CIVIL PENALTY AUTHORITY

Finally, we urge revisions in the Commission's authority to collect civil penalties from alleged violators of orders and rules.

A. Repeal of section 5(m)(1)(B)

Under Section 5(m)(1)(B), the FTC is able to seek civil penalties of up to $10,000 per violation from companies for violating final cease and desist orders entered in proceedings against other firms. Section 5(m)(1)(B) does not require that the company from which the FTC is seeking penalties was actually a party to, or had prior notice of and an opportunity to be heard in, the original cease and desist proceeding. Instead, all that is required is that the charged company (1) engage in an act or practice after a cease and desist order with respect to such act or practice has become final and (2) have "actual knowledge" by virtue of that cease and desist order that the act or practice in question has been found "unlawful." In effect, Section 5(m)(1)(B) turns cease and desist orders into general rule without even minimal due process protections applicable to agency rulemaking under the Administrative Procedure Act.

When originally enacted in 1975, Section 5(m)(1)(B) was intended to enable the FTC, after it had fully and fairly litigated the lawfulness of a particular act or practice against one respondent, to move quickly and effectively against other firms using the same practice in the same or similar circumstances. Experience with the FTC's exercise of its new Section 5(m)(1)(B) authority since that time clearly demonstrates that, however reasonable that intent of Congress may have been, the procedure is inherently unfair and subject to manipulation and abuse.

Thus, rather than employ its Section 5(m)(1)(B) powers as a means of follow-up enforcement to properly litigated proceedings, the FTC has undertaken a program of wholesale mailings of both old and new orders, including many of an extremely general nature and application. It has done so despite the plain prospective wording of the statutory language which contemplates that only Commission determinations made after January 1975 are to be used as a basis for bringing a penalty action.[29] By this device, the agency is in a position to eschew conventional proceedings and to claim, on the basis of ancient orders, penalties of $10,000 per violation against companies on its mailing list.

The FTC's 1978 "down products" mailing illustrates how Section 5(m)(1)(B) has been and can be misused. In that case, the Commission sent out to 250 industry members a "notice package" containing orders dealing with the labeling of down products made between 1942 and 1957—although an important Seventh Circuit reversal of a highly relevant Commission decision in this area was omitted. In addition, the Commission's Staff Enforcement Policy Statement, which was included in the notice package, declared that failure to comply with the Commission's *1971 Down Products Guides* would be deemed to be a violation of the 1942-1957 orders despite the fact that: (1) the labeling standards contained in the 1971 *Guides* were substantially different from those in the 1942-1957 determinations; (2) no cases had been brought since the 1971 *Guides* were adopted; and (3) the FTC had previously stated that the *Guides* have no force of law or precedential value, are only advisory in nature and merely represent the Commission's opinion as to what might be an unfair or deceptive practice. Clearly, this sort of informal rulemaking by the Commission's staff, without hearings or other procedural safeguards, was never intended under Section 5(m)(1)(B)

Furthermore, the Section 5(m)(1)(B) authority also creates a distinct potential for manipulation of the administrative process even when an actual cease and desist hearing is held. For example, the FTC can select as a respondent the firm which, for financial or other reasons, is least able to mount an effective defense. Thereafter, the agency can seek to use any final cease and desist order entered against such a respondent, whether or not tested on judicial review, as a conclusive determination of the legality of the practice in civil penalty proceedings against other companies.[30] Indeed, although the FTC asserts that it will only use its Section 5(m)(1)(B) authority only with respect to litigated cease and desist cases, there is nothing in the statute itself which would prevent the bringing of a civil penalties proceeding based on a negotiated consent order.

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[29] Section 5(m)(1)(B) provides in pertinent part: "If the Commission determines in a proceeding under subsection (b) * * * and issues a final cease and desist order with respect to such act or practice, the Commission may commerce a civil action to obtain a civil penalty in a district court * * * "

Under the plain meaning of the underscored words in the present tense, Congress intended that the provision be applied prospectively only, i.e., on the basis of legal principles established in determinations (final orders) made after the January 4, 1975 effective date of the statute.

[30] Under Section 5(m)(2), only "issues of fact" are open for litigation in the civil penalties action by a defendant which was not specifically named in the original cease and desist order.

The only judicial authority interpreting Section 5(m)(1)(B), an interlocutory district court decision,[31] has created a great deal of confusion. Acknowledging the obvious due process problems inherent in this provision, the district court held that a civil penalties defendant was certainly entitled to litigate both whether it had "actual knowledge" of the "unlawfulness" of its conduct and whether its conduct was different from that proscribed in the earlier order. In addition, the court further suggested that, "in an appropriate case," a defendant might defend on ground of lapse of time and changed conditions, or perhaps even attack the legal sufficiency under Section 5 of the FTC's prior determination. Thus, the court's decision has created substantial uncertainty as to exactly what is open for litigation in a Section 5(m)(1)(B) penalty proceeding.

The fundamental defect of Section 5(m)(1)(B) is its failure to safeguard one's right not to be held liable for civil penalties without a reasonable opportunity to establish the legality of one's conduct. Because there is no requirement in the statute for prior notice and an opportunity to be heard, the FTC can demand enormous monetary penalties on the basis of old orders or, alternatively, by picking on the weakest target and extending a resulting cease and desist order industrywide. Basic fairness and due process require that the FTC be prepared to litigate the legality issue fully and fairly against all industry members that may be affected before civil penalties can be imposed.

In addition, Section 5(m)(1)(B) suffers from vague and ambiguous drafting. Although the entire provision is premised upon the existence of a final cease and desist order, a defendant may be held liable for civil penalties based upon "actual knowledge that [an] act or practice is unfair or deceptive," irrespective of actual knowledge of the prior order. Similarly, because statutory liability arises merely from a "final" order, rather than one entered after hearing and decision, there is a danger that Section 5(m)(1)(B) civil penalties could be sought on the basis of negotiated consent without any adversarial testing of legality.

All of these problems are further compounded by the possibility that $10,000 penalties may be imposed for "each violation" (emphasis added). What constitutes an individual violation, however, is nowhere defined, nor is any maximum number of possible violations resulting from a single transaction specified. As recent cases demonstrate, one bulk mailing or the circulation of a single publication may result in millions of separate violations and potential civil penalties measured in billions of dollars.[32]

For all these reasons, the U.S. Chamber believes that the only sensible solution to the Section 5(m)(1)(B) problem is repeal of the provision in toto.

B. $500,000 maximum

Even with repeal of Section 5(m)(1)(B), problems would still remian under Section 5(1), as it applies to consumer protection penalties,[33] and Section 5(m)(1)(A), the provision authorizing penalties for violation of trade regulation rules. In those instances, penalties could be levied beyond the seriousness of any alleged offense. Without impairing the deterrent effect of civil penalties, the maximum penalty for any related series of alleged violations should not exceed $500,000.

A limitation of the penalty recoverable is needed in all consumer protection actions by the Commission for two very substantial and related reasons. First, like so much of the FTC Act, the penalty provisions lack precision. Although the statute imposes a penalty of $10,000 for "each violation," it does not define the term. With this flaw in the statute, it is possible to treat a single transaction as a series of multiple violations. As we demonstrated earlier at page 29, one bulk mailing or the circulation of a single publication may result in millions of separate violations—each punishable by a $10,000 forfeiture.

Second, in these circumstances where the potential liability has no foreseeable limit, business persons accused of violation can rarely afford to test their cases on the merits. Most settle out of court on the best terms negotiable. Of 49 civil penalties exacted over the period 1978 through 1983, 41 were the result of settlements.

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[31] *United States v. Braswell, Inc.*, 1981-2 Trade Cases 64,325 (N.D. Ga. 1981).

[32] *E.g., United States v. Golden Fifty Pharmaceutical Co., Inc.*, 421 F. Supp. 1199 (N.D. Ill. 1976) (ruling that government could have charged 25 million violations, one for each copy of a comic book containing an offending advertisment); *United States v. Reader's Digest Ass'n, Inc.*, 662 F.2d 955 (3d Cir. 1981), *cert. denied*, 50 L.W. 3570 (1982) (bulk mailing of 16 million copies of an advertisement constituted as many separate violations).

[33] We make not attempt at this time to address the maximum for alleged violation of antitrust or "unfair methods of competition" orders.

It is doubtful that the FTC is 84 percent infallible, as these figures would suggest. We can only conclude that many penalties were paid to avoid the risk of much larger liability. In short, many payors yielded to pressure.

The government shold not possess such intimidating power over its citizens, and a realistic limit on the civil penalty could alleviate the situation. We reiterate that a maximum of $500,000 could well be set without impairing the deterrent effect of civil penalties in any way.

CONCLUSION

The Chamber appreciates the opportunity to bring the views of its members to the Subcommittee's attention. We are confident that these important issues will be debated fully and fairly, and we hope that the concepts incorporated in our proposals will provide a basis for constructive legislative supervision of the Commission's future activities.

APPENDIX

Draft legislation to clarify FTC's power to prevent "unfair methods of competition" and "unfair or deceptive acts or practices"

1. Amend Section 5(a)(1) of the Federal Trade Commission Act (15 U.S.C. 45(a)(1)) to read as follows:

"(1)(A) Unfair methods of competition in or affecting commerce are declared unlawful: *Provided, however,* That no method of competition shall be deemed to be unfair unless it—

(i) Violates sections 1 or 2 of the Sherman Act; or

(ii) Is expressly defined to be an unfair method of competition by Federal statute.

(B) Unfair or deceptive acts or practices in or affecting commerce are declared unlawful where such acts or practices—

(i) Consist of material representations known to be false or made in reckless disregard of their truth or falsity, or

(ii) Directly cause or may foreseeably result in substantial economic injury to consumers and such injury is neither reasonably avoidable by consumers themselves nor outweighed by countervailing benefits to consumers or competition.

II. Amend Section 5(a) of the Federal Trade Commission Act (15 U.S.C. 45(a)) by adding a new paragraph (3) which reads:

"(3) Nothing in subparagraph (1)(B) of this subsection shall apply to any act or practice which is authorized by Federal statute or subject to the direct regulatory authority of another Federal agency."

[The following information was subsequently received for the record:]

QUESTIONS OF THE MINORITY AND THE ANSWERS THERETO

Question. Are you advocating no role for the FTC in per se cases? Doesn't the FTC bring resale price maintenance cases? Aren't those cases per se illegal?

Answer. Under the Chamber's proposal, the FTC would retain full authority to enforce the Sherman Act and thus would be empowered to institute proceedings under both the traditional rule of reason standard and the per se prohibitions applicable to certain types of anticompetitive conduct.

The Chamber believes, however, that FTC antitrust enforcement should not duplicate the efforts of the Department of Justice. Because only the Justice Department can seek criminal sanctions, the Department has properly focused much of its enforcement activity on "hard core," per se types of violations for which criminal penalties are an important deterrent. In the Chamber's view, the FTC can best complement the Department's efforts by channeling its expert economic resources toward litigation of the more complex, economically-oriented issues that generally arise under a full-scale rule of reason analysis.

Under a sensible allocation of Sherman Act responsibilities between the two agencies, the FTC would continue to play a vital role with respect to developing and testing per se theories of violation. Because the creation of a new per se rule requires extensive empirical evidence of pernicious anticompetitive effects, broad-ranging economic analyses of the type often involved in FTC proceedings are a prerequisite before any new emerging business practice or conduct can properly be classified as per se illegal. Similarly, the FTC can and should reexamine the economic underpinnings of various antitrust theories, including some which may have borne the per se label in the past, and expose obsolete doctrines which are economically unsound.

Resale price maintenance cases, for example, represent an area where future FTC enforcement activity can play a key part in the development of antitrust theory. More than seventy years ago, the Supreme Court assumed in *Dr. Miles Medical Co.* v. *Jonh D. Park & Sons,* 220 U.S. 373, 404-09 (1911), that vertical price fixing is equivalent in all respects to horizontal price fixing and constitutes an unlawful restrain on alienation. Since then, although some legal and economic scholars have raised questions about the validity of these assumptions, courts have continued to treat resale price maintenance as per se illegal without further critical analysis. Significantly, however, within the last few weeks, the Supreme Court has granted certiorari in the case of *Monsanto Company* v. *Spray-Rite Service Corp.*, Docket No. 82-115, in which the issue of per se treatment for vertical price restrictions may well be reexamined.

Should the Supreme Court provide new guidance in the *Monsanto* case, the FTC will then have a major responsibility in refining and clarifying this area of the law as each new case comes before it for review. The agency, bringing to bear its economic resources, will be in a position to interpret broad principles that the Court may establish and to flesh out their application in specific factural circumstances.

Even if the the Supreme Court does not resolve the existing uncertainty over the appropriateness of per se treatment for vertical price restrictions, this is still an area where FTC enforcement can properly complement Justice Department activity. Perhaps reflecting a certain unease with existing doctrine, virtually no criminal prosecutions for resale price maintenance have been instituted over the years. Accordingly, there is no special reason to assign enforcement responsibility in this area solely to the Justice Department. Should the Supreme Court decline to resolve the controversy surrounding the appropriate standard in resale pricing cases, the FTC can and should continue to bring such proceedings in which the fundamental economic considerations can be fully aired.

Question. How does your proposal to define unfairness and deception under Section 5 differ from Chairman Miller's proposal?

Answer. In both overall purpose and design, the Chamber's proposal and Chairman Miller's suggested statutory language address similar problems and advocate similar solutions. Both provide that misrepresentations made with improper intent are per se actionable on a misconduct theory. Similarly, both proposals recognize a need to bound enforcement efforts against unintentional misrepresentations made in good faith by requiring an appropriate analysis of injury to reasonable consumers.

The principal difference between the Chamber's position and Chairman Miller's articulation of "deception" is the degree of misconduct required to hold a seller strictly liable. In the Chamber's view, the conduct-oriented prohibitions of a new deception definition should apply where material statements are "known to be false or made in reckless disregard of their truth or falsity." Such a standard will deter unethical practices and fraudulent behavior, yet preserve legitimate freedom for commercial speech presented in good faith.

Chairman Miller's proposal would apparently apply a lower standard of simple negligence in assessing seller conduct under the deceptive per se analysis. To do so, we believe, goes further than necessary and cannot be justified under a conduct deterrence rationale. Negligence is an elusive standard whose application would depend on the Commission's construction of a reasonable seller. In situations where seller bad faith is not in issue, the Chamber believes that a further analysis of actual injury to reasonable consumers is appropriate in order to justify FTC intervention against commercial speech.

Question. Are there any ongoing FTC investigations which your new paragraph 5(A)(3) would stop?

Answer. The new paragraph 5(A)(3) in the Chamber's legislative proposal, which would prevent FTC consumer protection jurisdiction from usurping the jurisdiction of specialized regulatory agencies, is not intended to "stop" any pending FTC investigation. Rather, the proposal is presented in response to a series of proceedings in recent years in which the FTC, rather than focusing its enforcement efforts on commercial sales and marketing issues, has attempted to extend its consumer protection jurisdiction to issues such as product design, safety and environmental effect which generally fall within the appropriate competence of other specialized regulatory bodies. See, e.g., *International Harvester,* FTC Docket 9147 (concerning "fuel geysering" problem in farm tractors); *American Motors Corp.*, 3 CCH Trade Reg. Rep. ¶21,890 (concerning handling and driver control problems in new jeep vehicles).

The Chamber does not have access to a comprehensive list of all ongoing FTC investigations and is therefore unable to comment on whether any of them would contravene the new proposed paragraph 5(A)(3). To the extent any such investigation seeks to invade an area which Congress has committed to the direct regulatory authority of another federal agency, however, the Chamber's proposal would appropriately require that the FTC redirect its scarce enforcement resources back to the traditional marketing issues which are the special province of its consumer protection jurisdiction.

Question. At the authorization hearings, the Commission unanimously supported amending Section 5(m)(1)(B) of the FTC Act to permit a defendant to challenge the legal basis for the Commission's prior order. Does this alleviate some of your concerns regarding this section?

Answer. While the Commission's proposal to amend Section 5(m)(1)(B) could alleviate some of the concerns the Chamber has raised, it does so at an excessive price. In effect, the Commission's proposal would alter the fundamental nature of FTC enforcement based upon an administrative process and, instead, could create a corps of "U.S. Attorney"-type litigators at the agency and swamp the Federal District Courts with complex 5(m)(1)(B) cases.

As originally enacted, Section 5(m)(1)(B) was intended to enable the FTC, after it had fully and fairly litigated the lawfulness of a particular act or practice against one respondent, to move quickly and effectively against other firms using the same practice in essentially the same circumstances. Any litigation in the district court, as originally envisioned, would be relatively simple and straight-forward: first, the FTC would introduce its prior order; second, it would establish actual knowledge of the order by the defendant (usually through certified mailing of the order); and third, it would demonstrate that the defendant continued to use the prohibited practice in the same factual circumstances. That such district court litigation was to be streamlined is reflected in the statute itself which suggested that only the "issues of fact"—i.e., was the defendant using the outlawed practice—would be "tried de novo." 15 U.S.C. § 45(m)(2).

As detailed in the Chamber's original testimony, the fundamental defect of Section 5(m)(1)(B) is its failure to safeguard the fundamental due process right not to be held liable for civil penalties without a reasonable opportunity to establish the legality of one's conduct. In response to this concern, judicial decisions interpreting the sections have already suggested that which the Commission now proposes—namely, that the district court must review both factual and legal issues in any Section 5(m)(1)(B) litigation. *United States* v. *Allied Publishers Services, Inc.*, 1982-2 Trade Cases ¶ 64,983 (E.D. Cal. 1981); *United States* v. *Braswell, Inc.*, 1981-2 Trade Cases ¶ 64,325 (N.D. Ga. 1981).

This approach, however, while reducing due process problems, would effect a fundamental change in FTC enforcement activity. Rather than bringing administrative proceeding as Congress intended, the agency's attorneys would be unleashed upon the district courts for full-scale, de novo litigation of each and every Section 5(m)(1)(B) case. The Chamber questions whether either the already overworked district judges or the FTC's staff are properly equipped and have the necessary resources to handle this eventuality.

In the Chamber's view, the Commission proposed amendment to Section 5(m)(1)(B) would result in an inevitable proliferation of complex district court litigation that would unreasonably burden the scarce resources of courts, defendants, and the agency alike. The Chamber, therefore, continues to believe that the best—and only really workable—solution to the Section 5(m)(1)(B) problem is repeal of that provision.

The CHAIRMAN. Mr. Amschler?

Mr. AMSCHLER. Thank you, Mr. Chairman.

My name is James Amschler, and I am the assistant general counsel of Carrier Corp. of Syracuse, N.Y. I have with me today Mr. Howard Vine, who is on the staff of NAM and is the director of competition.

The NAM appreciates this opportunity to appear before you to present the views of our membership on the reauthorization of the Federal Trade Commission. You will recall that this is the second time in as many years that we have appeared before this committee, and I am pleased to have the record reflect that our positions remain constant.

Two years ago I assumed the chairmanship of the NAM subcommittee on FTC antitrust. In anticipation of the expiration of the 1980 FTC Improvements Act and the corresponding reauthorization, I directed our policy group to assess the current state of FTC statutes and regulations, placing particular emphasis on legislative clarity, procedural fairness, and enforcement consistency.

From that exercise the membership developed a series of legislative proposals designed, we believe, to do the following: To foster a better understanding of compliance requirements; to create a balance of Federal accountability with the consumer protection interests of the public; and to insure enforcement rationality.

Taken as a whole, the recommendations we offer to this committee today will produce a strengthened relationship between the Federal Trade Commission and the business community to the direct benefit of the public beneficiaries of FTC consumer protection.

You will note that our statement filed with this committee does not address the area of "unfair methods" jurisdiction, but is instead confined to the consumer unfairness and deception jurisdiction of the Commission. We have limited our focus in this authorization to what we believe is the most pressing area of congressional concern.

I urge this committee not to view this focus, however, as any form of concession to the present formulation of "unfair methods" jurisdiction. Rather, we believe the phrase "unfair methods" is similarly in need of better definition, and we urge Congress to return, following the completion of this current reauthorization, to perfect this legislative language.

In the last Congress certain organizations on behalf of their members attempted to persuade Congress that legislative exemption, not correction, should be the rightful subject for authorization. During that period, the NAM approached the authorization process in a narrow manner, attempting to avoid involvement in that controversy.

We are here today, however, somewhat more experienced, knowing that we can no longer remain on the sidelines while a debate—or perhaps more pointedly, an obstacle—stands in the way of passing an FTC definitions-accountability bill.

I have personally presented the scenario of the last Congress and the retrenchment of these obstacles to this Congress to the NAM FTC/Antitrust Subcommittee. I am proud to inform this committee today that we no longer remain on the outside of this controversy. Rather, we stand ready to assist this Congress and the FTC in moving forward reauthorization legislation by stating the position of the National Association of Manufacturers with respect to the exemptions being sought. This position is as follows:

> In view of the paramount interest to the NAM in the passage of FTC reauthorization legislation, the NAM urges Congress to move swiftly to enact such legislation without further consideration of exemptions for individuals or entities.

The time has come to reauthorize the FTC and the NAM finds no value to further deferring action on this measure. The core legislation reported last year by this committee reflected in principle the concensus of NAM membership on this issue, and we urge you to move forward to completion of this necessary project.

The NAM position on these issues is as follows:

> For purposes of legislative clarity and compliance certainty, we require a definition of both the terms "unfair" and "deception." Used interchangeably in boilerplate fashion, the business community is guaranteed little certainty of their meanings.

We support the standards for definition of "unfairness" as articulated to this committee in the March 5, 1982, letter of the Commission; but it is the NAM's position that without statutory permanence, this guidance may some day be lost.

With respect to deceptive acts or practices, we agree with Chairman Miller's statement that if you define one-half of a boilerplate statement, you must necessarily define the other half. Chairman Miller's analogy to a balloon is all too apparent to be brushed aside, and we truly fear that legislative definition of "unfairness" will shift the emphasis to the undefined term of "deception."

For purposes of procedural fairness, we urge that section 5(m)(1)(B) be amended according to the principles outlined in the decision of *United States* v. *Braswell*, thereby injecting substantive due process prior to the imposition of orders.

Further, in this area of procedural fairness, we believe a prevalency requirement in the case of industrywide rulemakings is long overdue. Creation of this procedural checking will perform the desired function of insuring that the resources of the Commission and the burdens of compliance to industry are reserved for those cases which truly justify Federal intervention under such a method.

For purposes of enforcement rationality, we strongly support definition of the term "violation" as used in sections 5(l) and 5(m) of the FTC Act. Consistent with the defining of the term "violation"——

The CHAIRMAN. Mr. Amschler, I am going to have to ask you to abbreviate and stay within the time limit we have.

Mr. AMSCHLER. Fine, sir. We support a cap of $100,000, which we have drawn from FTC penalty enforcement history.

Last, we also would urge the committee to make permanent the moratorium provisions of the 1980 FTC Improvements Act.

Thank you.

The CHAIRMAN. Thank you, sir.

[The statement follows:]

STATEMENT OF JAMES R. AMSCHLER AND HOWARD A. VINE ON BEHALF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS

Mr. Chairman, for the record, I am James R. Amschler, Assistant General Counsel of The Carrier Corporation, Syracuse, New York. I appear before you today in my capacity as Chairman of the NAM's FTC/Antitrust Subcommittee and I am accompanied by Mr. Howard A. Vine, Director of the Corporate Finance, Management and Competition Committee of the NAM.

The NAM welcomes this opportunity to testify before your Subcommittee to present our views on the reauthorization of the Federal Trade Commission "FTC". The NAM is a voluntary business organization of approximately 12,000 members and has affiliations, through its Associations Department and the National Industrial Council with an additional 158,000 businesses. In total, NAM members account for nearly 80 percent of the nation's industrial output and 85 percent of the nation's industrial workforce.

INTRODUCTION

NAM members are highly sensitive to the impact of FTC actions upon their businesses, both from the perspective of the Commission's antitrust or "unfair methods" jurisdiction and from the Commission's consumer prohibitions on "unfair or deceptive acts or practices." NAM members view the reauthorization process as a significant opportunity to rexamine areas in FTC practice needing refinement.

The FTC is an agency of Congress. As the FTC Improvements Act of 1980 illustrated, the reauthorization process permits Congress, the public, and the federal agency the opportunity to reconsider both the direction of the underlying mandate and the means by which such responsibilities are carried out. As was evident with the FTC reauthorization process conducted in 1979/80, and bearing in mind that all Commission powers emanate from Congress, Congress proceeded with the view that limitations on the agency's exercise of federal investigatory and enforcement authority were needed. While the underlying policies of the agency remained intact, Congress, based upon evidence brought to light during reauthorization hearings, reached a consensus regarding the need for limitations upon the discretionary enforcement power of the agency.

The fact that the FTC remains on a short-swing reauthorization process of a two-year cycle allows constituents of the agency, including the NAM, the opportunity to bring before Congress relevant information relating to the success or failure of the agency in handling its mission. As has been seen in recent times, the reauthorization process, particularly with respect to the FTC, has taken on added importance. The basis for this heightened sensitivity to FTC authorization results from an acknowledged need for additional clarity of the Commission's discretionary authority and compliance requirements, increased awareness of the FTC's prosecutorial weapons and their potential for abuses. We need not dwell upon actions initiated during the 1970s which document the potential for abuse of FTC authority, or the great magnitude of resulting costs incurred in attempting to mitigate and prevent such intervention. For purposes of this statement, we need only cite the shared monopoly case against the cereal industry which the Commission pursued with all vigor—based upon no more authority than the broad discretion bestowed upon the agency under the vague concept of unfairness and without any corresponding basis in fact or necessity. Under its consumer jurisdiction we need only cite the lengthy, expensive, and futile attempt to regulate and prohibit advertising directed at children, once again on the theoretical basis of unfairness.

The ramifications of an arm of the federal government pursuing a course of action premised upon theory, speculation and misguided instinct are serious. Cost estimates in the aborted effort to challenge children's advertising place the incurred costs in government man-hours and exorbitant legal fees by parties in that single case at approximately $35 million. In that case, Congress imposed a moratorium on FTC rulemaking in the children's advertising area. There is uniform acceptance that actions of the federal government must strictly conform to the policy guidance enuciated both in statutory language and common sense. In both the "KidVid" and "shared monopoly" cases, statutory ambiguity was such as to permit FTC overreaching.

In "Kid-Vid," the matter was allowed to progress to a point which necessitated a congressional response. The "shared monopoly" cease commanded in excess of ten years of time, talent and resources to establish that the action should never have been brought. These cases illustrate the need for Congress to rechannel the allocation of Federal Trade Commission resources to areas legitimately the subject of federal action.

SUMMARY OF NAM POSITION

The NAM views federal intervention, through the FTC or other agency action, as a course which should be pursued with caution. The vast power and resources of the federal government should be reserved for those cases where the statutory policy guidance is explicit, substantially injury is likely to occur and could not be reasonably avoided, and the costs of the injury have a net effect which outweigh the overriding benefits to consumers or competition. The actions of the federal government must be restrained and the exercise of discretion should weigh heavily on the side of caution absent any legally supportable basis of need. NAM specifically urges that Congress, during this reauthorization process, focus upon the elements which form the basis for prosecutorial and rulemaking discretion of the FTC. Such a focus, we believe, will lead Congress to the recognition that past experience with the lack of statutory checks on the zealousness of the Commission staff evidences a need for clear congressional direction to the FTC.

Further, the NAM suggests that Congress employ this authorization process to channel the resources of the Commission and to enunciate with clarity the bases both for federal intervention and the imposition of penalties which will be consistent with policies that seek to accomplish deterrence, punishment and compensation.

The NAM recommends that Congress adopt legislation to reauthorize the Federal Trade Commission, and that such legislation contain provisions which will:

Define consumer "unfairness" to mean acts or practices which may foreseeably result in substantial harm to consumers which is neither reasonably avoidable by consumers themselves nor outweighed by countervailing benefits to consumers or competition generally;

Define "deception" to mean "unlawful acts in or affecting commerce which consist of material representations which are (a) known to be false or made in reckless disregard of their truth or falsity, or (b) may result in substantial consumer injury which is neither reasonably avoidable by consumers themselves nor outweighed by countervailing benefits to consumers or competition generally;

Institute a "prevalency" requirement wherein the Commission would be required to demonstrate that conduct sought to be prevented under use of trade-regulations rules is "prevalent" within the industry;

Establish a cap of one hundred thousand dollars ($100,000) on the aggregation of civil penalties arising under a single marketing plan violation;

Clarify the Commission's civil penalties procedures under section 5(m)(1)(B) through codification of the due process rights enunciated in *US* v. *Braswell;*

Make permanent the moratorium provisions of the 1980 FTC Improvements Act relating to legislative veto, intervenor funding, and the use of consumer unfairness with respect to advertising and trademarks useage.

Each of these points is discussed below, in addition to the NAM's position on those provisions contained within the FTC Improvements Act of 1980 which are due to expire on September 30, 1983.

UNFAIR METHODS OF COMPETITION

The NAM, so as not to detract from the need for Congress to focus on FTC jurisdiction relating to "unfair or deceptive acts or practices", has deferred comment on that portion of the FTC Act deling with antitrust matters during these reauthorization hearings. This by no means should be construed as NAM acquiescence to the present formulation, interpretation and application of that jurisdiction. Rather, the NAM considers the "unfair methods" jurisdiction to be, like the "unfair or deceptive acts or practices" jurisdiction, also subject to added clarification and codification by Congress. By separating out this issue during these authorization hearings, the NAM urges that Congress soon return to consider the enforcement ramifications of the present application of "unfair methods". Such a focus on "unfair methods" jurisdiction should closely follow Congress' resolution of the definitional and prosecutorial difficulties inherent in the application of "unfair or deceptive acts or practices.".

FTC PROSECUTORIAL DISCRETION "UNFAIR * * * ACTS OR PRACTICES"

The issue of greatest concern to the membership of the NAM, at this time, stems from the ability of the Commission, under Section 5(a)(1), to challenge conduct on the basis of a prohibition on "unfair or deceptive acts or practices." That provision was created by Congress to bestow upon the FTC power to prevent conduct which bears no tangential relationship to competition as had been required prior to enactment of the Wheeler-Lea Act amendments. While "unfair methods" jurisdiction was central to the creation of the Commission, and was intended to be responsive to a congressional perception that the courts were emasculating the express prohibitions found in the Sherman antitrust statute, it was found that court decisions were limiting FTC intervention to cases involving some form of anticompetitive behavior. In 1938, Congress, again employing the term "unfair," extended Section 5 ("methods" jurisdiction) to include the express prohibitions on "unfair or deceptive acts or practices."

The NAM membership has struggled to define the meaning of the term unfair. As constituents of the FTC subbject to potential prosecutions and rulemakings, NAM members have sought to carefully interpret the legislative history and court decisions concerning the meaning of unfairness.

The legislative history accompanying Congress' enactment of unfairness provides little guidance for purposes of aiding compliance. The legislative history merely affirms that the term "unfair" is an ambiguous standard subject to subject interpretation.

The NAM is certain that, without congressional input on the elements that form the basis for Commission actions, neither reliance nor clarity will be reflected in FTC actions. The fact that the leadership of the Commission is subject to change provides little assurance that earlier FTC statements of Commission interpretation will govern. Similarly, as the issue of unfairness now stands, the subjective determinations as to what form of conduct constitutes "unfairness" will remain vested in the whims and prejudices of the Commission staff and members.

The only clarity that can be achieved and which will provide constituents of the Commission with both protection from overreaching federal instrusion and some degree of certainty is to establish a series of criteria, each of which must be met prior to the FTC challenging any form of conduct premised upon consumer unfairness. By adopting this position, the NAM is urging Congress to reconsider the circumstances in which Commission action is desirable and productive to the consumer.

The NAM is confident that the past problems that have befallen the FTC and its constituents—needless prosecutions, improper allocations of resources, and vast expenditures of dollars—can be avoided through codification of prosecurtorial and rulemaking standards.

NAM's recommendations for threshold criterion, which would be required to be met by the FTC prior to taking action, are founded in logic and fairness. The tests which the FTC endorsed and which we support are embodied in a March 5, 1982, Commission letter to the Senate Commerce Committee. It would require the Federal Trade Commission and its staff to demonstrate the bases which suggests a need for federal involvement.

NAM's recommendation for a prosecutorial test is composed of three elements: 1) a foreseeable substantial consumer injury; 2) an inability of consumers to reasonably avoid such injury; and 3) that the conduct in question should have net detrimental effects upon either consumers or competition generally. In other words, that the conduct in question not be outweighed by countervailing benefits or costs. Each of these elements, in our opinion, should be considered and viewed as essential determinations prior to commitment of the resources of the FTC on a particular case. Actions should be premised solely on the establishment of each criterion. Failure to substantiate a basis of action because one element may be lacking would serve to prevent any FTC involvement.

SUBSTANTIAL CONSUMER INJURY

The first element should be the most basic consideration of any federal prosecution—the need to prevent harm. Per our proposal injury must also be substantial. This test would require the Commission to take a questionable consumer practice one step beyond the intuitive finding that conduct may potentially or even actually result in consumer injury. The Commission would be required to show, on the record, that the actual injury at issue could reasonably have been foreseen. Thus, the Commission must clearly prove that enough information exists by which the Commission can draw the conclusion that absent federal intervention injury is not only likely to occur, but is foreseeable under the circumstances.

The injury must be of such substantial nature as to plainly justify federal intervention. As the Commission stated in its December 17, 1980, letter to Congress concerning unfairness:

"Emotional impact and other more subjective types of harm * * *, will not ordinarily make a practice unfair. Thus, for example, the Commission will not seek to ban an advertisement merely because it offends the tastes or social beliefs of some viewers." (p. 6)

We fully agree with this initial formulation of the meaning of substantial consumer injury. However, we view this formulation as initial because it has been cast in a negative manner as to what shall not be deemed substantial. We urge Congress to follow the Commission's most recent elaboration (March 5, 1982) on the meaning of substantial consumer injury and we suggest that this principle be codified so as to provide more certainty. In the March 5, 1982, letter, the Commission states: "As a general proposition, substantial injury involves economic or monetary harm and does not cover subjective examples of harm such as emotional distress or offenses to taste or social belief." (March 5 Commission letter at page 8)

AVOIDABILITY OF CONSUMER INJURY

The NAM also supports the Commission with regard to the test for actionable consumer injury. In its March 5, 1982, letter, the Commission formulated this test as follows: "* * * an unfair act or practice must be one which consumers could not reasonably have avoided. The commission should not be involved in rectifying the unfortunate choice of a particular consumer decision. It should confine its activities to curb behavior that takes unfair advantage of consumers' inadequate knowledge in reaching a decision or inability to protect themselves from such behavior." (letter at p. 8.)

NAM recommends that this principle be codified. Each branch of the FTC's three-pronged test for consumer injury is of significance from a technical and legal point of view. This requirement—that the Commission act only where consumers have no reasonable means of protecting themselves—is critically important. Indeed, it is the key to ensuring that FTC actions are meaningful contributions to the functioning of a free marketplace.

The FTC position supported by the NAM is no retreat to the old days of "let the buyer beware." Under the "reasonably avoidable" standard, the Act (Section 5) would continue to reach abusive conduct which distorts or frustrates free consumer choices. Examples would include the selling of phony cures to seriously ill cancer patients,[1] or refusing to reassemble appliances supposedly dismantled for inspection until a contract is signed.[2] Both of these examples, drawn from established FTC precedents, illustrate consumer harm which would continue to be actionable.

At the same time, the FTC's practical approach clearly confirms that the Commission has no place as a "national nanny" or a utopian social and economic engineering agency with a mandate to tell Americans what is good for them. For example, where adequate maintenance, use and care information for a product is available, consumers who come to grief because they choose to ignore this information should not be treated as wards of the Federal Government. NAM policy language is explicit in supporting and encouraging disclosure of information to consumers. After all, if a seller's product is unsuitable or the seller's conduct is in fact unreasonable, consumers in the marketplace will penalize it far more effectively than the Commission.

At the core of our social and economic system is our faith in free and informed individual decisionmaking. In the political arena, our society tolerates no interference with the individual's free choice in the voting booth. In the economic sphere also, we should tread cautiously before stripping the individual of his rights and responsibilities as a consumer.

COUNTERVAILING BENEFITS

The NAM considers the likelihood of countervailing benefits of great significance in reaching a final conclusion that an FTC prosecution or rulemaking initiative is warranted. The determination of countervailing benefits will force a matter in question to be fully balanced between the potentially harmful act or practice and the net practical benefit to consumers or competition. This balancing of interests would require the Commission to quantitatively and qualitatively reduce its perception of a potential injury by the factors of economic and social costs and benefits that a practice may entail. In reaching this determination of "net" effects, the Commission should account for the costs of a prospective remedy, costs to the parties, increased paperwork and regulatory burdens, reduced incentives for innovation and capital formation and other similar considerations.

The NAM views the Commission letter of March 5, 1982, as constructive in this respect and urges Congress to codify the principles and intent of that letter. The Commission's letter states a position wholly consistent with that of the NAM with regard to countervailing benefits:

"... the injury should not be outweighed by consumer or competitive benefits resulting from the challenged practice. Clearly, most business practices involve an economic and social mixture of costs and benefits; hence, unless a particular practice has the *net* effect of being injurious, the Commission should refrain from finding it unfair. In reaching its decision, the Commission should take into account costs related to a prospective remedy, including but not limited to direct costs to the parties, increased paperwork and regulatory burdens, reduced incentives for innovation and capital formation and like matters." (letter at p. 8, emphasis supplied)

SUMMARY OF THREE ELEMENT TEST

The NAM urges Congress to enact and codify a three element requirement which, upon being met, would substantiate a basis for FTC actions premised upon "unfair ... acts or practices" jurisdiction. As evidenced by the Commission in its letter to Congress dated March 5, 1982, the three criteria—substantial consumer injury, reasonable avoidability and lack of countervailing benefits—properly reflect a reasoned approach to balancing the federal interests in prosecution with the costs and benefits which may result from a questioned practice. This test further illustrates and reflects the sensitivity of Congress, the FTC and its constituents to the need to confine government intervention to acts and practices that require the powers and resources of the federal bureaucracy.

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[1] See, e.g., *Travel King Inc.*, 86 F.T.C. 715, 774 (1975).

[2] *Holand Furnace Company* v. *FTC*, 295 F.2d 302 (7th Cir. 1961); cf. *Arthur Murray Studio Inc.* v. *FTC*, 458 F.2d 622 (5th Cir. 1972).

In principle, each element of the three-pronged test is supported by the present Commission. The only dissent that apparently exists relates to the recommended approach of codifying and setting into statute these prosecutorial and rulemaking standards. The distinct differences between the Commission interpretation of consumer unfairness issued in 1980, and the recent elaboration of March 5, 1982, evidences the fact that Commission composition can influence the level of discretion under an unfairness interpretation. So that members of the NAM, the business community and others may conduct their businesses and relationships with the federal government in a rational and consistent manner, we urge Congress to codify these terms and elements. While there is some truth to the dissenting statement of Commissioner Pertschuk, the potential for long-term future clarity will outweigh the costs of insecurity and ambiguity.

DECEPTIVE ACTS OR PRACTICES

Empowered to prevent acts or practices which are "unfair or deceptive," the FTC has historically construed this to mean that its consumer jurisdiction is composed of two equal parts, and that the words can be used interchangeably. As a result, Commission actions during the past decade illustrate a use of "boilerplate" charges alleging conduct that constitutes neither deception nor unfairness, but both. This blurring of the distinctions between these words has resulted in needless confusion. Sudden changes in Commission usage of one term or another, as distinguished from the traditional interchange of words, will likely create further confusion and subtle yet significant enforcement distinctions. Similarly, compliance requirements are likely to be difficult, if not impossible, to predict.

The NAM is concerned that, bearing in mind the years of past Commission allegations and practices, an unfairness amendment will create new meaning and vitality for deception. Commission Chairman Miller, in our view, properly characterized this fear when he stated that the Commission could well apply a concept. "called in physics the LeChateleir principle * * * if you have a balloon and you push on one side of it, things change on the other side of the balloon."

We believe this section of Commission jurisdiction is just such a creature and that legislative division, at this late date, between unfairness and deception will likely prove this principle correct.

As Chairman Miller underscores: "If we admit there is a problem for commercial advertising with respect to unfairness, we also have to think about the possibility that the Commission might go after the same kinds of things under its deception authority. Just because everybody feels they now know what deception is does not mean that the Commission will stay within that definition in the future. That is the reason I think it is good for Congress to make explicit the kinds of standards the Commission should have in that area."

NAM fully shares Chairman Miller's assessment and concerns about the potential application of the "unfair or deceptive" jurisdiction of the FTC, barring corresponding legislative action on deception. Any review of past Commission actions premised on this consumer authority underscores the potential for abuse. Congress has recognized the legitimate concerns of the business community regarding ambiguity and administrative excess. The business community, members of Congress and the Commission itself (bar one member) all welcome codification of a limitation on unfairness. NAM members strongly support this congressional action. However, when viewing this section of the FTC's statute in its entirety, congressional action on unfairness is incomplete; and thus an equal number of problems resolved under unfairness may haunt the business community by problems created with the renewed emphasis on deception.

The NAM maintains that the term deception does not defy definition. The common law is saturated with court decisions construing the boundaries of deception. However, these decisions lead yet to another ambiguity—that the current definition of deception is advertising or other representations "which have the capacity or tendency to mislead." While boundaries are admittedly established, the NAM believes these boundaries defy definition. Chairman Miller pointedly articulated this problem when he stated: "Under this definition, virtually any ad can be found to be deceptive. This possibility arises because there are virtually no limits on the kinds of claims that are actionable. There are no checks on the reasonableness of the agency's construction of the meaning of the advertising or the injury that the claim might lead to."

These words of Chairman Miller underscore the difficulty of the Commission in drawing parameters of appropriate federal action. Inasmuch as Congress will attempt to define the meaning of consumer unfairness, similar action with respect to deception is clearly in order.

The NAM recommends that language which would directly define the limits of FTC deception actions be immediately put into place. Specifically, the NAM urges Congress to amend the FTC Act to define deception as meaning: "unlawful acts in or affecting commerce which consist of material representations which are—(a) known to be false or made in reckless disregard of their truth or falsity; or, (b) which are likely to cause substantial consumer injury, which is neither reasonably avoidable by consumers themselves nor outweighed by countervailing benefits to consumers or competition generally."

This proposed definition incorporates the accepted common law principles of deception which brings to bear the full powers of the Commission to act against any instances of actual falsehood or intentionally misleading representations. By so providing, the power of the Commission to prevent and punish such deceitful conduct is reinforced and made subject to the full remedial authority of the FTC. The proposed language further provides the foundation upon which future substantiation cases may rest, in that failure to have a reasonable basis in fact, upon which a claim is made, may be actionable as a statement "made in reckless disregard of its truth or falsity."

Part (b) of the proposed language would define the basic standards by which a practice is to be adjudged in violation of the Commission's deception jurisdiction. By using the language "substantial consumer injury" part (b) moves the Commission more appropriately towards being required to find that consumers are likely to be injured. The current standard, "capacity or tendency", plainly lacks this concrete guidance and is one of subjective meaning. This proposed standard, we believe, will perform two positive features in that it will lend itself more to objective application by the Commission and set a basis for the Commission to develop independent evidence that consumers in fact are likely to be misled by double meaning in an advertisement and that subsequent unavoidable injury may likely occur.

The proposed definition also provides for the standard that consumers must not be able to reasonably avoid the prospective injury, as a precondition to liability. Therefore, where sellers have acted in good faith, and the consumer comes to grief through misinterpretation, or carelessness, the FTC should be prevented from intervening. This standard does not, in any manner, compromise the protections necessary for so-called "vulnerable" groups. In fact, we believe that this standard would properly permit the FTC to evaluate an advertisement in light of the special circumstances that pertain to such groups. Advertisings intended to deceive persons of unique sophistications would clearly be barred under part (a) of the proposed definition.

The Commission, prior to bringing actions based upon deception, would be required under part (b) to find that a genuine "injury" to consumers did in fact occur. By this, the proposed language would encourage the Commission to find a threshold wherein injury can be considered so minimal as to discourage the initiation of the enforcement authority of the FTC. While no specific cost/benefit analysis requirement is proposed, the NAM does believe that the requirement to determine "countervailing benefits" should be construed as requiring a balancing of interests between the general value of information supplied to the total marketplace and the impact of the deceptive practice on some consumers. Where it is suggested that injury may have occurred or may likely result, we believe that the resources of the federal government should be evaluated against the degree of potential harm, the remedial measures available to consumers themselves, the potential for overriding or offsetting benefits to the general marketplace and the general enforcement priorities of the agency. Absent such a preliminary analysis, we believe, federal action would be premature and the proposed language would discourage such adventures.

Lastly, and perhaps of greatest general significance, the proposed definition in both part (a) and (b) incorporates a "materiality" requirement. The NAM believes that only representations that relate to the qualities of a product or service that the seller is seeking to market and that actually influence consumer behavior relating to the purchase of the advertised product should reasonably fall within the realm of legitimate federal intervention. This is not to suggest that false advertising which fails to influence consumers is exempt, but is to say that the justification for federal intervention—the power, resources and tools of the FTC—should only be brought to bear where there can be a reasonable basis to believe that consumer behavior will likely be altered due to misinterpretation.

PREVALANCY

Consistent with the justification warranting definition of the terms "unfair" and "deceptive"—compliance certainty and appropriate federal responses to perceived harms—the NAM recommends that Congress install an accountability mechanism over the FTC's rulemaking process. Under current jurisdiction and administrative procedures, the FTC is empowered to span the universe of business conduct searching for accidents to happen. While this general oversight practice may be wholly legitimate and justified by federal protection policies, it has permitted the Commission to impose industry-wide corrective measures resulting from isolated conduct. As we have encouraged earlier in our testimony, cost effectiveness of federal intervention and its resulting imposition of burdens to industry must be constantly assessed. Under current practice, however, the FTC is licensed to presume common conduct in an industry wherein the objectives of a few may be the antithesis of the industry at large.

The NAM believes that a requirement of a demonstration of "prevalency" can serve as an effective accountability measure to insure that the rulemaking process is employed only in situations evidencing a pattern of unlawful conduct. Imposing upon an entire industry regulatory requirements, absent a showing of prevalent conduct, reflects governing by presumption and suspicion. Creation of a prevalency requirement, we believe, will not limit the agency's ability to prevent or deter unlawful conduct but will permit a balancing of interests allowing prospective requirements to be more properly directed to commonality of conduct in a given industry.

The NAM urges Congress to amend section 18(a) of the Federal Trade Commission Act (15 U.S.C. 57(a)) by adding a new paragraph to read:

(3) The Commission may issue a notice of proposed rulemaking with respect to any unfair or deceptive act or practice or any false advertisement (as defined in section 15(a) (1)) only if—

(A) the Commission has issued two or more cease and desist orders regarding such unfair or deceptive act or practice, or such false advertisement; or

(B) any other information available to the Commission provides the Commission with reason to believe that a pattern of such unfair or deceptive acts or practices, or such false advertisements, exists.

CAP ON CIVIL PENALTIES

Another serious problem revolves around the different possible interpretations of what constitutes a "violation" of § 5, and how large the money penalties may be (which depends on how one counts "violations").

At present, § 5(1) of the Federal Trade Commission Act imposes a "civil penalty of nor more than $10,000 for each violation" of an order of the Commission; it also provides that "each separate violation of such an order shall be a separate offense." But the statute gives no guidelines as to what constitutes a "violation".

Section 5(m) provides a similar $10,000 civil penalty for "each violation" of a Commission rule, but also fails to define a "violation".

In the absence of guidelines as to what constitutes a "violation", however, a businessman cannot predict his possible exposure for civil penalties. Will it be $10,000 for a single violation, or will it be $10,000 for each of several violations? If there is even a remote chance for the latter, the manager may forego legitimate and constitutionally protected activity. As important, if the Commission should later seek civil penalties, the business manager's legal adviser will be hard pressed to give any accurate assessment of the potential exposure. The decision to defend an action, with a reasonable defense, will be based solely on the potential exposure rather than on the merits of the case. Consequently, the civil penalty process is likely to be protracted, with no clear benefits for the consumer public or society in general.

NAM's concerns are not unrealistic. Internal guidelines, which recently became public, have been developed at the FTC.[3] Those guidelines refer to a 1962 civil penalty action over two misleading ads that appeared in 302 comic books. Nine separate publishers printed and distributed more than 25 million copies. The government alleged, and the court found, only nine violations—one for each of the publishers. But the court's opinion stated that "in reality each comic book published and mailed which reaches the hands of a recipient is a violation of the Order." [4] As a result of that dictum, the Commission staff now believes that, for the same conduct that led to a civil penalty for nine violations in 1962, it now could sue for up to 25 million violations.[5] Recently, the Commission has begun to exercise this "discretion." For example, in a penalty action in California, respondent had filled some 252 orders for 21 different printed forms allegedly in violation of a Commission order, selling in all more than 305,000 of the printed forms. The government contended that each of the forms sold to creditors and debt collection agencies constituted a separate violation. In 1980, the court agreed, and found more than 305,000 violations.[6] And just within the last two years, in Philadelphia, the United States Court of Appeals for the Third Circuit affirmed a civil penalty judgment holding that each of some 16 million advertisements distributed in six bulk mailings constituted a separate violation, and that each of the so-called violations was subject to a maximum penalty of $10,000.[7]

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[3] See "FTC Oversight: The JS&A Case," Hearing Before the Subcommittee on Oversight and Investigations of the Committee on Energy and Commerce, H.R. (97 Cong., 1st Sess.) Serial No. 97-38, September 18, 1981, p. 232 (hereinafter "JS&A Oversight"). It is unclear whether these "guidelines" have the imprimatur of the full Commission, or merely reflect the legal research of one FTC staff member (see id., p. 231).

Traditionally, there are three legitimate functions for a civil penalty provision: (1) compensation (when injury occurs); (2) deterrence; and (3) punishment of wrongdoers. Because penalties under the FTC Act are paid to the general treasury, the importance of the compensation function to § 5 is less than clear. In any event, the purposes for the penalty provision can be served adequately if the civil penalty sections are amended to ensure that the interpretation of the statute and the penalties imposed are rational and predictable.

We therefore propose two amendments: (1) to clarify that a "violation" should be defined so that the penalty bears a relation to the actions of the alleged wrongdoer and to the number of decisions the business manager makes; and (2) to place a cap of $100,000 on the amount of the civil penalty that may be imposed for offenses that arise from a common plan or a single business course of action.

We believe the amendments we propose strike a fair and reasonable balance of legitimate government goals, while providing clear and predictable standards to guide business managers in their behavior. If the FTC Act is amended as we propose, substantial penalties will be available to deter multiple violations. The government will also be free to seek even stiffer penalties from those who continue to violate Commission orders or rules, and to obtain contempt citations with commensurate fines and other sanctions againt scofflaws. But legitimate publishers, advertisers and broadcasters who make a single decision (later determined to be erroneous) and disseminate material (later determined to violate an order or rule) will no longer be threatened with unreasonable multiplication of violations and devastating penalties or even possible bankruptcy.

As a final matter, with respect to the cap on civil penalties, NAM asks that two documents serve as appendices to today's testimony. Appendix I is a memorandum that outlines the legal arguments in support of congressional action to define a "violation" under Sections 5(l) and 5(m). Appendix II is a survey of settlements and judgements rendered during the years 1976–1982 for violations of FTC orders and rules. We believe that these appendices evidence a need to define a "violation" under FTC practice and to establish a cap on the aggregation of civil penalties.

SECTION 5 (M) (1) (B)—REMEDIES AND VIOLATIONS

The NAM suggests that Congress reconsider the present construction and underlying basis of Section 5(m)(1)(B), the civil penalty section. While valid arguments exist which would support repeal of this section, the NAM urges Congress to do no less than amend the Commission's 5(m)(1)(B) authority.

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[4] *United States* v. *Wilson Chemical Company, Inc.*, (W.D.Pa. 1962), 1962 CCH Trade Cases ¶ 70,478, at p. 76,957, affirmed per curiam (3 Cir. 1963) 319 F. 2d 133.

[5] The guidelines for the Assessment of Civil Penalties or other Equitable Relief state: "the Commission can frame its Complaint so that such disseminations are broken down, for example, by states, by dates mailed, by different zones or by different issues in which the advertisement appeared. Thus, depending upon how the violation is charged, the Complaint may allege a million violations (the number disseminated), 50 violations (the states in which the comic books were disseminated), 15 violations (the dates on which they were mailed), five violations (the zones), or one violation (the single magazine in which the ad appeared)" (JS&A Oversight, p. 251) (footnote omitted.)

[6] *United States* v. *Floersheim* (C.D.Cal. 1980) CCH Trade Cases ¶ 63,368, at p. 75,872 affirmed (9 Cir. 1981) 659 F. 2d 1090.

[7] *United States* v. *Reader's Digest Association, Inc.* (3 Cir. 1981), 662 F. 2d 955, certiorari denied (January 18, 1982) —— U.S. ——.

Under Section 5(m)(1)(B), the Commission may seek to impose civil penalties of up to $10,000 against companies who allegedly violate final cease and desist orders entered in proceedings against other firms. NAM's concerns relates to the inherent lack, within the substantive and procedural terms of Section 5(m)(1)(B), of due process accorded parties subject to the provision. Section 5(m)(1)(B) permits the FTC to impose penalties and requirements upon companies who were not parties to, nor provided notice and opportunity to be heard in, original cease and desist proceedings.

NAM urges that should Section 5(m)(1)(B) authority continue, Congress must ensure that all elements of "due process," including notice to be heard and opportunity to participate, be required as a statutory procedural requirement for the implementation of Section 5(m)(1)(B) penalties.

ISSUES SUBJECT TO EXPIRATION UNDER THE FTC IMPROVEMENTS ACT OF 1980

Section 10(a).—Intervenor funding: NAM has long opposed the funding, through taxpayers' dollars, of witnesses and public participants in agency rulemaking proceedings. Our premise throughout has been that the funding of intervenors extends beyond the policy justification of encouraging a broader range of views to agency proceedings, to having the general revenues supporting the arguments and philosophy of a small segment of the public. In this regard, NAM was active in opposing Section 18(h) (Intervenor Funding) of the FTC Act, and correspondingly was greatly supportive of the amendments in the 1980 FTC Improvements Act, which a cap on the level of compensation which may be paid to rulemaking participants. Although the Commission, at this time, has no funds with which to carry out any form of intervenor funding program, the cap on disbursements under that program is subject to expire, and the NAM wishes to again express its disapproval of any form of intervenor funding program and urges at a minimum continuation of the current cap.

Section 11(b).—Commercial Advertising: The NAM supported the moratorium which was placed upon Commission activities relating to rulemaking and regulation on the basis of "unfairness" of commercial advertising. That moratorium is scheduled to expire on September 30, 1983. As pointed out earlier in our statement, the NAM urges Congress to provide for added clarity and control over "unfair or deceptive acts or practices" jurisdiction. In this regard, NAM continues to support limiting the rulemaking ability of the Commission to pursue bans directed at both commercial speech and commercial advertising based upon theories and interpretations of "unfairness." This position, we believe, is consistent with the approach we recommend be taken on prosectorial and rulemaking discretion and is intended to supplement the imposition of an "element" test.

Section 21.—Legislative Veto: The entire legislative veto mechanism (including the appeals procedure) is slated to terminate after September 30, 1983. NAM has long supported imposition of a legislative veto mechanism for reasons of fairness and as a means to provide a check and balance upon the regulatory system. NAM will continue to press for legislative veto throughout the regulatory process and, in this regard, urges Congress to make permanent the temporary legislative veto.

This concludes our prepared statement, and we will be happy to respond to any questions.

APPENDIX I

WHAT IS A "VIOLATION" UNDER FTC ACT SECTIONS 5(l) AND 5(m)?: THE ARGUMENT FOR CONGRESSIONAL ACTION

I. OVERVIEW

FTC Act

The Federal Trade Commission Act of 1914 was enacted to prevent unfair or deceptive acts and practices, and unfair methods of competition. Under the Act, the Federal Trade Commission has a wide range of powers. For example, the Commission may promulgate rules, investigate charges, act as prosecutor to enforce statutes, and sit as a judicial body hearing charges. The Act now provides for a civil penalty of $10,000 for "each violation" of a Commission order or rule.

The issue

What constitutes a "violation" under the FTC Act? If a businessman uses a single bulk mailing to distribute 1,000 identical copies of a single advertisement contrary to an FTC order or rule, does he commit one violation? If so, the maximum penalty is $10,000. Or does he commit 1,000 violations—one for each of the 1,000 copies? If so, the maximum penalty is $10 million—$10,000 for each "violation."

The importance of the issue

The determination of what constitutes a "violation" under the FTC Act is of crucial importance to the administration of justice. Both the Government and businessmen need objective standards. Otherwise they may find themselves as parties to protracted litigation with unknown potential liability and no clear benefits for the ultimate consumer. The stakes can be enormous, the outcome unpredictable, and accordingly, the chances for prompt resolution nil.

The state of the law

To date, neither the language nor the legislative history of the FTC Act has provided fair guidelines on this matter. Court rulings have produce inconsistent results: some courts have counted each dissemination—mailing, broadcast or press run—as a single violation; but many have counted each copy of a violative advertisement as a separate violation, even if all copies were disseminated as part of a single business transaction.

The emerging precedence of the latter view is most alarming: a publisher, advertiser or broadcaster could be charged with multiple violations for distributing copies of, or broadcasting, a single advertisement. With a maximum penalty of $10,000 for each violation, potential liability quickly ranges into the billions of dollars. As a practical matter, a businessman's fate will be in the hands of a single district court judge, who may have discretion to assess a $1 penalty—or a penalty of more than $1 billion!

The need for new legislation

Even assuming that the Commission will voluntarily refrain from seeking the maximum penalties, the chilling effect upon the First Amendment rights of publishers, advertisers and broadcasters is obvious. By converting the act of publishing or broadcasting a single advertisement into million of violations, the Government, in the hope of obtaining substantial settlements for minor (if any) offenses, can threaten businesses with civil penalties in the billions of dollars. For example, newspaper with a circulation of 100,000 would be subject to a maximum civil penalty of $1 billion under the prevailing judicial rule that each of the 100,000 individual copies of the newspaper constitutes a separate violation warranting a $10,000 maximum penalty.[1] An advertiser who buys a single television spot that is viewed by a nationwide audience might be held to have committed tens of millions of violations, one for each recipient of the television broadcast, and face a potential penalty in the hundreds of billions of dollars.[2]

A prosecutor has discretion in enforcing the law. And some uncertainty in the business community (with attendant increased costs and adverse affects on consumers) or uneven treatment of competitors (even within a single industry) is unavoidable. But the FTC Act did not contemplate and fundamental principles of justice should not tolerate that a prosecutor would be permitted in fact to seek these enormous penalties. The clear potential for abuse must be eliminated. It is essential that the FTC Act be amended to foreclose the possibility of multimillion, and even billion, dollar penalties for single business transactions.

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[1] Some 125 newspapers have daily or Sunday circulations exceeding 100,000 and would face liabilities exceeding $1 billion for a single publication. The potential liability for a single advertisement in the Sunday New York Daily News, with its current circulation of about two million, is $20 billion (see *Brown & Williamson Tobacco Corp.* v. *Engman* (2 Cir. 1975) 527 F.2d 1115, 1119, n. 7, certiorari denied (1976) 426 U.S. 911). More than 130 magazine have circulations exceeding 400,000 and face potential liabilities for a single publication exceeding $4 billion.

[2] Nearly 60 television stations serve metropolitan areas that have more than 1 million potential viewing households. Some 583 television stations serve communities that have potential audiences of more than 100,000 households so the potential liability for each such station would exceed $1 billion.

II. FTC ACT SECTION 5 AND ITS LEGISLATIVE HISTORY

Section 5(l)

Section 5(l), first enacted in 1938, originally provided a $5,000 penalty for each violation of a Commission order. As subsequently amended, section 5(l) now provides for violations of Commission orders "a civil penalty of not more than $10,000 for each violation * * *. Each separate violation of such an order shall be a separate offense * * *."

Nothing in section 5(l), however, suggests how the number of violations should be counted when, for example, a newspaper circulates 100,000 copies of a single edition in violation of a Commission order or rule, or where an advertiser distributes a million copies of a single advertisement in a mass mailing. In short, "the statute is unclear as to what constitutes a separate violation" (46 N.Y.U.L. Rev. 521).[3]

The legislative history of section 5(l) is unclear, but testimony during Congressional hearings on amending the Act's penalty provision did suggest that the number of violations should be limited under section 5. At that hearing, Federal Trade Commissioner Davis read a memorandum that he and the Commission's chief counsel had coauthored; it stated:

"[A] misrepresentation in *one issue of a catalogue* that may deceive many customers *is but one act* * * *" (Hearings before the Committee on Interstate Commerce on S. 3744, 74th Cong., 2d Sess., p. 21 (Feb. 21, 1936) (italics added).

Furthermore, one commentator who has made a considered study of section 5(l) concluded: "[I]t is reasonable to assume that in 1938, when section 5(l) was enacted, Congress did not contemplate the problems created by a system of national media which today disseminate so much of the material involving deceptive or misleading practices" (46 N.Y.U.L. Rev. 521).

Section 5 (m)

Section 5(m) provides that a party who knowingly violates a Commission rule or order "shall be liable for a civil penalty of not more than $10,000 for each violation." Like section 5(l), this section does not define a "violation."

The legislative history of section 5(m) is not definitive, but it does shed some light. This history suggests that Congress intended that penalties be reasonably related to the offending conduct, not potentially in the billions of dollars.

In 1975, Congress amended section 5(m) to permit the Commission to seek civil penalties of not more than $10,000 "for each violation" of any FTC rule concerning unfair acts or practices. The Senate Committee on Commerce report states that determinations of the number of violations should focus "on the decision-making process of the person against whom the penalty is sought, the number of different decisions he made and the harm generated by those decisions" (Report of the Senate Committee on Commerce on S. 356, S. Rept. 93-151, 93rd Cong., 1st Sess., p. 27 (May 14, 1973), reproduced in CCH Trade Reg. Rpts., No. 73 (May 21, 1973)).

III. JUDICIAL DECISIONS DEFINING THE NUMBER OF VIOLATIONS

The majority view

In response to novel agency demands to enforce the FTC Act to and beyond its limits,[4] courts in recent years have ignored the common sense approach of focusing on the decision-making process of business managers. Instead, the courts have formulated legal principles opening the door to potentially devastating liabilities against publishers, advertisers and broadcasters.

Example.—In 1962, one court suggested that each comic book published was a separate violation of a Commission order, even though 18 million comic books were published (*United States* v. *Wilson Chemical Co., Inc.* (W.D.Pa. 1962) CCH Trade Regs. Rptr. ¶ 70,478).

Example.—In 1976, another court ruled that the government could have charged 25 million violations, one for each copy of a comic book containing an offending advertisement (*United States* v. *Golden Fifty Pharmaceutical Co., Inc.* (N.D.Ill. 1976) 421 F.Supp. 1199).

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[3] In other areas, Congress has demonstrated that it can, when it so intends, expressly provide that individual items constitute separate violations or offenses. For example, Congress has made it unlawful to stamp gold with anything conveying the impression of government certification of quality; the statute expressly provides that "[e]ach and every such stamp shall constitute a separate offense" (15 U.S.A. § 291). Similarly, 15 U.S.C. § 1233(a) makes it unlawful to alter, fail to affix or fail to endorse a required automobile label, and provides that acts in violation "with respect to each automobile shall constitute a separate offense."

[4] See the 1980 Transition Team Report on the FTC, reproduced in the Congressional Record, reporting a consensus that the FTC has exceeded the reach of its statutory authority (Congressional Record, Sept. 21, 1981, S 10167).

Example.—In 1980, a court held that there were 300,000 violations of a Commission order where the defendant distributed 300,000 copies of a form in violation of an order (*United States* v. *Floersheim* (C.D. Cal. 1980) CCH Trade Regs. Rptr. ¶63,368, affirmed (9 Cir. 1981) No. 80-5444).

Example.—In 1981, the United States Court of Appeals for the Third Circuit held that an advertiser who used bulk mailing to distribute some 16 million copies of an advertisement committed as many separate violations, each of which was subject to a penalty of $10,000 (*United States of America* v. *Reader's Digest Association, Inc.* (3 Cir. 1981) 662 F.2d 955, certiorari denied (1982 —— U.S. ——).

A more reasonable approach

The unreasonableness of the majority view has not gone unnoticed. In the last example cited above, three judges of the Third Circuit dissented. They reasoned: "[T]he imposition of a penalty, in the context here, based on the number of individual documents (simulated travel checks and bonds) mailed to the public is inconsistent with the governing statute, which provides for a 'penalty of not more than $10,000 for each *violation.*' * * * Further, it is at least questionable that Congress would authorized a penalty of up to $10,000 for each piece of mail that is sent. If the rationale of the opinion in this case were to be applied to newspapers, for example, it could result in penalties of millions of dollars for a single press run. In the absence of clear language sanctioning a result of this kind, I would be reluctant to attribute such an intent to Congress" (ibid., Adams, Aldisert & Weis, J. J., dissenting).

Unfortunately, the view of these three judges was a minority view; a majority of the nine-judge Third Circuit sustained a million dollar-plus penalty and adopted a contrary view. Corrective legislation is now the only means of assuring that other courts will not follow these majority precedents.

At least one court has suggested a more reasonable approach: "[I]t is the *dissemination* of an illegal advertisement which violates the order, not the advertisement itself" (*United States* v. *J. B. Williams Company, Inc.* (S.D.N.Y. 1973) 354 F. Supp. 521, 547, affirmed in pertinent part (2 Cir. 1974) 498 F.2d 414) (italics added).

Under this approach, for example, the number of violations would be determined by the number of broadcasts of a televison advertisement, not by the total number of viewers who happen to see the broadcasts (498 F.2d 435–436). Similarly, individual copies of a newspaper advertisement would not constitute separate violations; instead, one would look to the number of editions (see *Piuma* v. *United States* (9 Cir. 1942) 126 F.2d 601, 603, certiorari denied (1942) 317 U.S. 637).

This more reasonable approach, which focuses on the number of decisions made by a businessman, is certainly more consistent with the case law in analogous areas:

Example.—In patent mark law, "where the marking is all done on the same day and at the same time, so that it is practically a single, continuous act, but one offense is committed and only a single penalty is recoverable, though more than one article may have been marked" (*London* v. *Everett H. Dunbar Corporation* (1 Cir. 1910) 179 Fed. 506, 507).

Example.—In the law of defamation: "any one edition of a book or newspaper, or any one radio or television broadcast, exhibition of a motion picture or similar aggregate communication is a single publication" (Restatement 2d, Torts, § 577A(3)).

But, again, legislation is now essential to implement this reasonable approach and to bring the FTC Act clearly into line.

IV. LEGISLATION IS NECESSARY TO PRECLUDE THE COMMISSION AND COURTS FROM USING A "MULTIPLE VIOLATION" RULE

The chilling effect

Without assurance that the Government cannot seek even a fraction of the maximum billion dollar penalties, publishers and advertisers will be reluctant to risk distribution of publications or advertisements. These enormous potential penalties will thus deter publishers and advertisers from distributing constitutionally protected commercial advertisements, and consumers will have less information upon which to base their economic decisions. Such "arbitrary" power to demand "potentially limitless" penalties under the FTC Act "will produce an *in terrorem* effect on business [but] may have little effect on the overall goal of the FTC Act * * *" (46 N.Y.U.L. Rev. 521, 523).

The threat of arbitrary Commission discretion

Even assuming that the Commission and the courts attempt to keep civil penalties to "reasonable" amounts, any decision to set a penalty where the perceived ceiling is *a billion dollars* is inherently arbitrary.

The failure of the courts

Moreover, "[t]he continuing ability of the courts * * * to set limits on penalty recoveries in face of the increasingly higher penalties being sought is questionable" (46 N.Y.U.L. Rev. 522), in part because a court's assessment of a penalty is necessarily biased by the number of violations alleged by the Government in its complaint. Thus, where the Government chooses to allege millions of violations, even a court's assessment of a penalty of 10 cents per violation may be excessive (see *United States of America* v. *Reader's Digest Association, Inc.* (3 Cir. 1981) 662 F.2d 955, certiorari denied (1982) —— U.S. ——).

The failure of the Commission

Reliance on the Government's self-restraint has been equally unsuccessful; it "appears to vest undue discretion in an administrative agency to exercise what is essentially a judicial function" (46 N.Y.U.L. Rev. 522). The Commission's "seemingly aribtrary method of counting violations" (46 N.Y.U.L. Rev. 522) is reflected in its own guidelines for the assessment of penalties:

Example.—In discussing a case of a comic book disseminated with a violative advertisement, the guidelines state: "* * * [T]he Commission can frame its Complaint so that such disseminations are broken down, for examples, by states, by dates mailed, by different zones or by different issues in which the advertisement appeared. Thus, depending upon how the violation is charged, the Complaint may allege [for the same conduct] *a million violations* (the number disseminated), *50* violations (the states in which the comic books were disseminated), *15* violations (the dates on which they were mailed), *5* violations (the zones), or *one violation* (the single magazine the ad appeared in)" (FTC Oversight: The JS&A Case, Hearing Before the Subcommittee on Oversight and Investigations of the Committee on Energy and Commerce, House of Representatives, 97th Cong., 1st Sess., p. 251 (Sept. 18, 1981) (italics added).

This broad discretion produces choatic results. Businesses subject to FTC regulation cannot make intelligent decisions without clear guidelines. Neither Commission lawyers nor private lawyers can appraise businesses of their duties, obligations and potential liabilities under the FTC Act because, in assessing penalties, the range of Government "discretion" is limitless under the current rule of law.

V. RECOMMENDATIONS

In order to resolve the ambiguity in sections 5(1) and 5(m) of the FTC Act and to avoid the adverse consequences of the "multiple violation" rule adopted by some courts, the FTC Act must be amended so that the concept of "violation" is clearly defined. These sections should be amended to focus upon the decision-making process of businesses in defining a "violation":

Recommendation.—Section 5(1) of the FTC Act should be amended by inserting, after the existing second sentence, the following sentence: "Any one edition of a book, magazine, or newpaper containing an advertisement or other statement in violation of a Commission order, any one bulk mailing of an advertisement or other statement in violation of a Commission order, any one radio or television broadcast of an advertisement or other statement in violation of a Commission order, or any similar communication made as a single business transaction in violation of a Commission order is a single violation and a single offense."

It is also recommended that section 5(m)(1)(B) be amended by inserting the above-quoted language after the existing last sentence.

Recommendation.—Similarly, section 5(m)(1)(A) of the FTC Act should be amended by inserting, after the exising last sentence, the following sentence: "Any one edition of a book, magazine, or newspaper containing an advertisement or other statement in violation of a Commission rule, any one bulk mailing of an advertisement or other statement in violation of a Commission rule, any one radio or television broadcast of an advertisement or other statement in violation of a Commission rule, or any similar communication made as a single business transaction in violation of a Commission rule is a single violation and a single offense."

CONCLUSION

If the FTC Act is so amended, the Government will remain free to seek multiple violations against parties who violate Commission orders or rules repeatedly, and also to obtain contempt citations with commensurate fines and other sanctions against scofflaws. But legitimate publishers, advertisers and broadcasters, who make a single erroneous dissemination, will no longer be threatened with unreasonable multiplication of violations and devastating penalties or even possible financial ruin.

APPENDIX II

SURVEY OF CIVIL PENALTIES FOR VIOLATION OF FTC ORDERS AND RULES: 1976–1982 SETTLEMENTS AND JUDGMENTS

1976

"In compliance matters, judgments for civil penalties totaling $1,342,500, were obtained during the fiscal year. Particularly noteworthy in fiscal 1976, was the settlement of outstanding counts in the *J. B. Williams* case for $125,000, bringing the total judgment in that case to $280,000, and a district court award of $1,036,000, now on appeal against William Bailey of Bestline Products, the largest award ever secured in a consumer protection case" (Federal Trade Commission, Annual Report (1976)).

1977

Court cases—Settlement

Kenneth Ogle: D. 6611, Judgment Entered: November 25, 1976, $5,000 in consent judgement.

Court cases—Judgment

Golden Fifty Pharmaceutical, Inc.: D. 8792, Judgment Entered: March 17, 1977, $147,500 in civil penalties for violation of a Commission order.

ABC Fabrics, Inc.: FTC Docket C-1806, Judgment Entered: April 26, 1977, $14,000 in civil penalties for violation of a Commission order.

Universal Electronics, Inc.: FTC Docket 8815, Judgment Entered: May 12, 1977, $6,000 in civil penalties for violation of a Commission order.

Safeway Stores, Inc.: FTC Docket 7584, Judgment Entered: June 8, 1977, $120,000 in civil penalties for violation of a Commission order; summary judgment granted in favor of Government.

Total 1977 Civil Penalty Judgments: $287,500 (Court Cases only).

Average 1977 Civil Penalty Judgments: $71,875 (Court Cases only).

1978

Settlements

STP Corporation: $500,000 civil penalty settlement; largest false advertisement settlement on record.

Merek and Company, Inc.: $100,000 settlement of a civil penalty action alleging violations of a 1966 FTC order.

Bridgestone Tire Company of America: $100,000 civil penalties settlement of a suit alleging violations of an FTC order.

Westinghouse Security Systems, Inc.: $10,000 civil penalties settlement of a suit alleging violations of FTC rule.

American Bridal Consultants: $3,000 in civil penalties re violations of trade regulation rule.

Four States Builders and Remodelers, Inc.: $10,000 civil penalties settlement for alleged violations of a 1972 FTC order.

Book-of-the-Month Club: $85,000 civil penalties settlement of allegations of violations of trade regulation rule.

City Sewing Machine Co.: $15,000 civil penalties settlement of action alleging violations of FTC trade regulation rule.

Hasbro Industries, Inc.: $40,000 in civil penalties re consent judgment based on false and deceptive advertising.

Verlan Industries, Inc.: $25,000 in civil penalties re consent judgment for violation of FTC rule.

Total 1978 Civil Penalties: $888,000.

Average 1978 Civil Penalty Settlements: $88,800.

Judgment

Auslander Decorator Furniture, Inc.: $50,000 civil penalty for violations of an order.

1979

Settlements

United States v. *Maralco Enterprises, Inc., et al.:* FTC Docket No. C–2711, Judgment Entered: May 15, 1979, $15,000 in civil penalties re violations of a 1975 FTC order.

United States v. *Atlantic Industries, Inc.:* FTC Docket No. 8941, Judgment Entered: Aug. 17, 1979, $10,000 in civil penalties re violations of a 1975 order.

United States v. *Panacolor, Inc., et al.:* FTC Docket No. 772 3044, Judgment Entered: Oct. 27, 1978, $40,000 in civil penalties in consent decree re violations of FTC trade regulation rule.

United States v. *Maylis Textile Corp., et al.:* FTC Docket No. C–1551, Judgment Entered: Nov. 13, 1978, $41,000 in civil penalties re violations of an FTC cease-and-desist order.

United States v. *Tri-Texas, Inc., et al.:* FTC File No. 742 3207, Judgment Entered: Sept. 27, 1979, $25,000 in civil penalties in consent judgment re violations of FTC trade regulation rule.

United States v. *Dixieland Construction Company, Inc., et al.:* FTC File No. 772 3–10, Judgment Entered: Sept 28, 1979, $10,000 in civil penalties in a consent judgment re violations of FTC trade regulation rule.

United States v. *Modern Home Improvement Corporation, et al.:* FTC File No. 772 3010, Judgment Entered: Sept. 28, 1979, $10,000 in civil penalties in a consent judgment re violations of FTC trade regulation rule.

United States v. *Nationwide Construction Company, Inc., et al.:* FTC File No. 772 3010, Judgment Entered: Sept. 28, 1979, $10,000 in civil penalties in a consent judgment re violations of FTC trade regulation rule.

Total 1979 Civil Penalty Settlement: $161,000.

Average 1979 Civil Penalty Settlement: $20,125.

Judgments

United States v. *The J. B. Williams Company, Inc., et al.:* FTC Docket No. C–2037, Judgment Entered: Feb. 16, 1979, $75,000 in civil penalties in judgment on violations of an FTC order.

United States v. *Lawson Hill Leather and Shoe Company, Inc.:* FTC File No. 792 3034, Judgment Entered: Mar. 8, 1979, $15,000 in civil penalties re violations of trade regulation rule.

United States v. *General Mills Fun Group., Inc.:* FTC File No. 782 3023, judgment Entered: May 23, 1979, $100,000 in civil penalties re advertising practices previously determined to be unfair and deceptive.

Total 1979 Civil Penalty Judgments: $190,000.

Average 1979 Civil Penalty Judgments: $63,333.

1980

Settlements

Haband Company, Inc.: $30,000 civil penalty in consent judgment re violation of FTC's Mail Order Merchandise Trade Regulation.

National Talent Associates, Inc.: $25,000 civil penalty in consent judgment re violations of prior cease-and-desist order.

Neighborhood Periodical Club, Inc.: $150,000 civil penalty in consent judgment re violation of prior FTC order.

United Compucred Collection, Inc.: $15,000 civil penalty in consent decree re violation of prior FTC order.

Mod-Maid Imports, Inc.: $25,000 civil penalty in consent decree re violation of FTC's Trade Regulation Rule on Care Labeling and Textile Wearing Apparel.

Exxon Corp.: $100,000 civil penalty in consent judgment re violation of FTC's Holder-In-Due-Course-Rule.

Anthony Abraham Company, Inc.: $25,000 civil penalty in consent judgment re violations of FTC's Holder-In-Due-Course-Rule.

Raymond M. Paron: $1,000 civil penalty in consent decree re violation of prior FTC consent order.

Keystone Readers' Service, Inc.: $50,000 civil penalty in consent decree re violation of prior FTC consent order.

Tri-West Construction Company: $2,000 civil penalty in consent decree re violation of prior FTC consent order.

United States Steel Corp. (Antitrust): $440,000 civil penalty, one of the largest in FTC history at the time, to settle charges of violation of prior FTC order by fixing prices on steel products.

Total 1980 Civil Penalty Settlement: $423,000.

Average 1980 Civil Penalty Settlement: $42,300.

(Total and Average excluding Antitrust case)

1981

Settlements

U.S. v. *Sure Products, Inc.:* (D.D.C. 1980) 3 CCH Trade Reg. Rptr. ¶ 21,803. $30,000 civil penalty in consent decree re practices which had been determined to be illegal in a prior FTC decision.

U.S. v. *Ramage:* (M.D.Fla. 1981) 3 CCH Trade Reg. Rptr. ¶ 21,804. $10,000 civil penalty in consent judgment re violations of FTC's Door-to-Door Sales Rule.

U.S. v. *Atlantic Hosiery, Inc.*: (M.D.Fla. 1981) 3 CCH Trade Reg. Rptr. ¶ 21,808. $16,000 civil penalty in consent decree re violation of prior consent order.

Phillip Morris Inc., et al.: (S.D.N.Y. 1981) 3 CCH Trade Reg. Rptr. ¶ 21,847. $300,000 civil penalties in consent judgment re violations of 1972 consent orders requiring clear and conspicuous disclosure of health warning in all cigarette advertisements.

American Brands, Inc. et al.: (S.D.N.Y. 1981) 3 CCH Trade Reg. Rptr. ¶ 21,848. $185,000 civil penalties re violations of 1972 consent orders requiring clear and conspicuous disclosure of health warning in all cigarette advertisements.

U.S. v. *Young Ford, Inc.:* (W.D.N.C. 1981) 3 CCH Trade Reg. Rptr. ¶ 21,859. $10,000 civil penalty in consent judgment re violations of FTC's "Holder-in-Due-Course" rule.

U.S. v. *Scott:* (N.D.Ind. 1981) 3 CCH Trade Reg. Rptr. ¶ 21,867. $10,000 civil penalty in consent judgment re violations of prior FTC order.

RJR Foods, Inc.: (N.D.Cal. 1981) 3 CCH Trade Reg. Rptr. ¶ 21,889. $70,000 civil panalty in consent decree re violations of prior FTC consent order requiring disclosure of percentage of natural juice content in Hawaiian Punch.

U.S. v. *Womack Nursery Co.:* (D. Tenn. 1981) 3 CCH Trade Reg. Rptr. ¶ 21,891. $35,000 civil penalty in consent decree re violations of prior FTC consent order.

Associated Dry Goods Corp.: Federal Trade Commission, Annual Report (1981). $75,000 civil penalty in consent decree re violation of prior cease-and-desist order.

Total 1981 Civil Penalty Settlements: $741,000.

Average 1981 Civil Penalty Settlement: $74,100.

1982

Settlements

U.S. v. *National Dynamics Corp.:* (S.D.N.Y. 1982) 3 CCH Trade Reg. Rptr. ¶ 21,911. $100,000 civil penalty in consent decree re violations of prior FTC cease-and-desist orders.

Avis Rent A Car System, Inc.: (E.D.N.Y. 1982) 3 CCH Trade Reg. Rptr. ¶ 21,944. $70,000 civil penalty in consent decree re violations of FTC's "Holder-in-Due-Course" rule.

Standard Educators Inc.: (D. Conn. 1982) 3 CCH Trade Reg. Rptr. ¶ 21,968. $25,000 civil penalty in consent decree re violations of prior FTC cease-and-desist order.

Total 1982 Civil Penalty Settlements: $175,000.

Average 1982 Civil Penalty Settlement: $58,333.

Judgments

U.S. v. *Danube Carpet Mills, Inc.:* (N.D.Ga. 1982) 540 F. Supp. 507. $24,500 civil penalty imposed by court against manufacturer, and its president, for violation of cease-and-desist order issued by FTC under Flammable Fabrics Act which prohibited sales of any carpet failing to conform to standards of Act.

U.S. v. *Potamkin Cadillac Corp.*: (2 Cir. 1982) 689 F.2d 379. $39,100 civil penalty imposed by court for failure to file a financial information form pursuant to an order of FTC ($100 for each day the report was not filed).

U.S. v. *Reader's Digest Association, Inc.*: (3 Cir. 1981) 662 F.2d 955, certiorari denied (1982) 455 U.S. 908. $1,750,000 civil penalty imposed by court for violation of FTC consent order.

U.S. v. *Louisiana-Pacific Corp.* (Antitrust): (D. Ore. 1982) 5 CCH Trade Reg. Rptr. ¶ 65,114. $4,000,000 civil penalty imposed by court for violation of FTC consent order requiring divestiture of a manufacturing plant.

Total 1982 Civil Penalty Judgments: $1,813,600.

Average 1982 Civil Penalty Judgment: $604,533.

(Total and Average excluding Antitrust case).

1977–82 SUMMARY

Total 1977-1982 Civil Penalties: $4,734,100.

Average 1977-1982 Civil Penalties: $89,304.

(Total and Average excluding Antitrust cases).

Source: Compiled from Federal Trade Commission Annual Reports, 1976-1981, except as indicated above.

[The following information was subsequently received for the record:]

QUESTIONS OF THE MINORITY AND THE ANSWERS THERETO

Question. In the *Reader's Digest* case, the mailing costs alone were 1.4 million dollars. What effect would your $100,000 cap have on such large scale activity.

Answer. The NAM believes that the costs of a practice violating an FTC order should not be the yardstick aginst which the appropriate level of FTC civil penalties should be measured. Rather, we would rephrase the question slightly: Would a $100,000 cap on civil penalties be sufficient to punish and deter conduct violating an FTC order? (We note that in the *Reader's Digest* case, although the size of the activity involved was large, the record is devoid of any demonstrable consumer injury.)

Considering the arsenal of remedies at the FTC's disposal and the consequences to the violator, in addition to a civil penalty fine, NAM believes that a $100,000 maximum aggregation fine (or an amount modestly higher) would provide adequate and necessary deterrence and punishment.

At the outset, NAM would like to emphasize that the proposed cap would not apply to violations involving unfair methods of competition. Thus, for example, a company failing to divest itself of an illegally acquired subsidiary could still be fined a justifiably high amount, absent an aggregation limit, to eliminate the accrued benefits of the violative conduct. Secondly, NAM's proposed cap on unfair or deceptive practices would apply to violations arising from a common marketing plan or campaign involving a series of actions related in planning, dissemination and time of occurrence. Thus, a respondent engaged in diverse violative conduct would be liable to possible fines in multiples of $100,000.

The $100,000 cap, in our view, provides sufficient deterrence because in addition to the fine:

The respondent's valuable good will and image—worth a great deal to consumer oriented companies engaged in large scale activity in particular—would be eroded considerably by attendant bad publicity about its conduct.

In litigated cases, court injunctions are typically issued—in effect, the company would be placed under a second order, increasing subsequent liability immeasurably.

Conduct violative of an order or trade regulation rule is most often violative of state and local law, subjecting the respondent to further potential liability. Attached is an appendix (Appendix I) which illustrates this fact.

Many states provide for private rights of action and class action suits for illegal conduct.

In short, the civil penalty fine is one among several hazards which a company risks when it engages in conduct violating an FTC order or trade regulation rule.

Further, the FTC also has other remedial powers in addition to a civil penalty action if the conduct involves serious consumer harm. Under § 13, 14 and 15 of the FTC Act, the Commission may seek an injunction to stop the advertising of false or misleading food, drug or cosmetic claims in its tracks. The FTC has also brought injunctions in other areas under § 5. Additionally, if the consumer is subjected to out-of-pocket losses, the Commission may sue for consumer redress and restitution under § 19 in federal district court.

Nor can the $100,000 civil penalty, especially in light of the loss of good will and other potential liability outlined above, be dismissed by a company under an order as a "cost of doing business." The incremental benefits of violative conduct in the vast majority of cases are not worth the risks to be incurred. (In the *Reader's Digest* case, for example, the record demonstrated that the promotion found in violation performed no better than advertisements not in violation of the order, i.e. there was no incremental benefit.)

While the NAM believes $100,000 to be a sufficient cap, it would seriously consider a modestly higher figure. We oppose the $1 million cap, however, which was reported in S. 2499 last year.

The current situation of unlimited potential liability for violating an FTC order or trade regulation rule is intolerable because it has given the FTC unbridled leverage to extract high finds in settlements. With potential liability so great, business persons accused of violations can rarely afford to test their cases on the merits. Of 50 civil penalties exacted over the period 1978 through 1982, for example, 42 were the result of settlement.

A $1 million fine, in our view, would not improve this untenable situation in a meaningful way. Rather, it would still allow for unconsciously high fines and would allow the FTC to retain the enormous leverage which it now enjoys. The $1 million limit, we fear, would be used as a negotiating device by the Commission staff to extend improperly the scope of an order or to obtain settlements.

Finally, Congress has considered the amount of an appropriate cap for penalties in other situations and decided on a significantly lower figure. The Consumer Product Safety Act limits penalty awards to $500,000 dollars for criminal conduct involving health and safety matters. Clearly, a cap of a lower amount for civil penalties for a violation not involving bodily injury or death is warranted for violations under the FTC Act.

The NAM believes that establishment of a cap on civil penalties will neither enhance nor debilitate FTC prosecutions. What we anticipate, instead, will be the injection of reasoned and consistent federal enforcement policies parallel to other existing statutes; sanctions which appropriately assess corporate liability for both punitive and deterrent reasons; and, assurance of balance in FTC settlement initiatives and litigation.

Question. How does your proposal to define unfairness and deception under § 5 differ from Chairman Miller's proposal?

Answer. The NAM proposal that the terms "unfair" and "deceptive" be defined is entirely consistent, both substantively and procedurally, with the recommendation of FTC Chairman Miller.

Question. Are there any ongoing FTC investigations which your new paragraph 5(A)(3) would stop?

Answer. The NAM has neither proposed nor issued a position with respect to amendment to Section 5(A)(3).

Question. At the authorization hearings, the Commission unanimously supported amending § 5(m)(1)(B) of the FTC Act to permit a defendant to challenge the legal basis for the Commission's prior order. Does this alleviate some of your concerns regarding this section?

Answer. The amendment supported by the Commissions, as reported by the Senate Committee last year in S. 2499, is responsive to the concerns outlined in our testimony before the Committee March 18, 1983.

APPENDIX I.—NATIONAL ASSOCIATION OF MANUFACTURERS RESPONSE TO MINORITY QUESTIONS, APRIL 15, 1983

State statute	All prohibitions (1)	Unfair or deceptive only (2)	Deceptive (itemization) (3)	Unconscionable (4)	Reference to FTC (5)	Private actions (6)	Minimum damages (7)	Multiple damages (8)	Punitive damages (9)	Equitable relief (rescission) (10)	Class actions (11)	Attorneys' fees (12)
Alabama												
Alaska Stat. § 45.50.471	X		X		X	X	X	X		X	X	X
Ariz. Rev. Stat. Ann. § 44.1521			X		X							
Ark. Stat. Ann. § 70-901			X		X							
Cal. Bus. & Prof. Code § 17200 (West) Cal. Civ. Code § 1700 (West).		X	X			X	X		X	X	X	
Colo. Rev. Stat. § 6-1-101			X			X						X
Conn. Gen. Stat. Ann. § 42-110 (West)	X				X	X			X	X	X	X
Del. Code Ann. tit. 6 § 2511		X										
D.C. Code Ann. tit. 28 App		X	X			X		X	X	X		X
Fla. Stat. Ann. § 501.201 (West)	X				X	X						X
Ga. Code. Ann. § 106-1201		X	X		X	X		X	X			X
Hawaii Rev. Stat. § 480-1	X				X	X	X	X				X
Idaho Code § 48-601	X		X		X	X	X		X	X		X
Ill. Rev. Stat. ch. 121½ § 261	X				X	X				X		X
Ind. Code § 24-5-0.5-1			X			X				X	X	X
Iowa Code Ann. § 714.16			X									
Kan. Stat. Ann. § 50-623			X	X		X	X			X	X	X
Ky. Rev. Stat. § 367.110		X		X		X			X	X		X
La. Rev. Stat. Ann. § 51:1401	X				X	X		X		X		X
Me. Rev. Stat. Ann. tit. 5, § 206	X				X	X				X		X
Md. [Com. Law] § 13-101		X	X		X	X						
Mass. Gen. Laws Ann. ch. 93A, § 1 (West).	X				X	X	X	X		X	X	X
Mich. Comp. Laws Ann. § 445.901		X	X	X	X	X	X			X	X	X
Minn. Stat. Ann. § 325.771 (West)			X			X				X		X
Miss. Code Ann. § 75-24-1	X		X			X				X		X
Mo. Rev. Stat. § 407.010			X		X	X			X	X	X	X
Mont. Rev. Codes Ann. § 85-401	X				X	X	X	X		X		X
Neb. Rev. Stat. § 59-1601	X					X			X	X		X
Nev. Rev. Stat. § 598-360			X									
N.H. Rev. Stat. Ann. § 359-A-1	X		X		X	X			X	X	X	X

APPENDIX I.—NATIONAL ASSOCIATION OF MANUFACTURERS RESPONSE TO MINORITY QUESTIONS, APRIL 15, 1983—Continued

State statute	All prohibitions (1)	Unfair or deceptive only (2)	Deceptive (itemization) (3)	Unconscionable (4)	Reference to FTC (5)	Private actions (6)	Minimum damages (7)	Multiple damages (8)	Punitive damages (9)	Equitable relief (rescission) (10)	Class actions (11)	Attorneys' fees (12)
N.J. Stat. Ann. § 56-8-1 (West)			X	X		X		X		X	X	X
N.M. Stat. Ann. § 57-12-1		X	X	X		X	X			X	X	X
N.Y. [Gen. Bus.] Law § 349 (McKinney)			X									
N.C. Gen. Stat. § 75-1	X					X		X	X			X
N.D. Cent. Code § 51-15-01			X									
Ohio Rev. Code Ann. § 1340.01 (Page)		X	X	X	X	X	X	X		X	X	X
Okla. Stat. Ann. tit. 15 § 751 (West)			X									
Or. Rev. Stat. § 646.605		X	X	X		X	X		X	X		X
Pa. Cons. Stat. Ann. tit. 73 § 201 (Purdon).	X		X			X	X	X		X		
R.I. Gen. Laws § 6-13.1-1	X		X			X	X		X	X	X	X
S.C. Code § 39-5-10	X				X	X		X		X		X
S.D. Codified Laws Ann. § 37-24-1			X			X						
Tenn. Code Ann. § 47-18-101		X	X		X	X		X		X		X
Tex. [B&C] Code Ann. tit. 2, § 17.41 (Vernon).			X	X	X	X		X		X		X
Utah Code Ann. § 13-11-1			X	X	X	X	X			X	X	X
Vt. Stat. Ann. tit. 9, § 2451a	X				X	X		X		X		X
Va. Code § 59.1-196			X			X	X			X		X
Wash. Rev. Code Ann § 19.86.020	X					X		X		X		X
W.Va. Code § 46A-6-101	X		X		X	X	X			X		
Wisc. Stat. Ann. § 100.18 (West)	X					X		X				X
Wyo. Stat. § 40-12-101			X			X					X	X[1]

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[1] Fees are awardable in class actions only.

The CHAIRMAN. Mr. Blum?

Mr. BLUM. Good morning, Mr. Chairman.

My name is Jared Blum. I serve as chairman-elect of the Small Business Legislative Council, and I also chair its antitrust committee. In my other life, the life which I get paid for, I am vice president and counsel for the Direct Selling Association. With me today is Thomas Mauro who serves as antitrust counsel for the Small Business Legislative Council.

Mr. Chairman, I would not want to review all of the reasons the small business community supports the Federal Trade Commission. I think we have been before this committee many times and endorsed further authorization for the Commission over the last several years.

You know and I know the reasons that the small business community give—that is, the maintenance of competition in the marketplace under which a small business might be able to thrive. The importance of small business to the economy of this Nation are well known. Small business is responsible for most of the new employment, innovation, and indeed provides the avenues for entrepreneurial motivation that makes this country great.

I would like to focus on the reasons that the FTC should be reauthorized with a minimum of restriction on its jurisdiction. In furtherance of its antitrust mission, the FTC has proceeded in two special and quite unique ways.

First, under section 5 of the FTC Act the Commission can reach those acts and practices that tend to be destructive of competition and tend toward monopoly, whether engaged in by one firm or by several. The Department of Justice cannot do this, for they must prove the existence of conspiracy or, alternatively, something close to actual monopoly under the constraints of section 2 of the Sherman Act.

The second unique area of FTC antitrust enforcement is the Robinson-Patman Act. To preserve competitive opportunity for small business, RP was enacted to stop in their incipiencies anticompetitive practices which may have plagued this country.

Basically the RP Act is intended to insure that small businesses can buy on the same terms and conditions as large businesses. It is a fundamental antitrust statute, Mr. Chairman, that demands the total support of Government. We are quite pleased at the SBLC that recent testimony by the FTC before the House Small Business Committee revealed that indeed the Commission is pursuing Robinson-Patman cases more aggressively than they have in the past.

We understand that there have been over 30 investigations opened and that several complaints have been issued over the past year.

We too in the small business community have some concern over the judgment the Commission has exercised in the past, especially in the area of consumer protection. However, we do not believe for those reasons that the Commission should be unduly constricted. I would like to address several of the proposals that come before this committee some time in the future with respect to those restrictions at this point.

First off, just as an aside, with respect to the regional offices, Mr. Chairman, we are pleased that there has been an agreement reached that will insure all regional offices will be kept open even though under a reduced staff. We would like to stress that it is the view of the small business community that these regional offices really give a preference to the competition mission in the regions in which they serve, as opposed to the consumer protection function.

The reason we state this is not for a lack of desire for consumer protection activities, but rather our belief that the States have in the past and continue to have relatively adequate funding in the area of consumer protection, but have had a woeful response in terms of funding antitrust provisions in the various States. So we would hope that the regional offices would be active in the competition area.

Legislation is pending before your committee which would exempt State-regulated professions from FTC jurisdiction. Now the SBLC represents over 4.5 million businesses, Mr. Chairman, and we want to state categorically for the record that we oppose this proposal.

Small business as well as large business is a large user of health and other services, and we believe there is no empirical data to give any reason why professions should be exempted from FTC jurisdiction in terms of their economic activities.

Other proposals which may have more meritorious intents such as clarifying the meaning of "unfairness" as it relates to the consumer protection function may be premature. Though predictability in law enforcement is a desirable goal, the Commission recognized the restrictures that exist, and indeed in their 1980 guidelines I think they set out a very firm approach which, if they follow, should not cause any problem to industry at that point.

With respect to unfair methods of competition, Mr. Chairman, there have been discussions by the Chairman of the Federal Trade Commission as well as other business groups that a change in this area is necessary. At this point, the Small Business Legislative Council opposes any consideration of changes in the unfair methods of competition aspects of the Commission's jurisdiction.

In conclusion, Mr. Chairman, much has been said and written over the past 2 years about the administration's antitrust policies. The small business community has virtually given up on the Department of Justice as its leadership refuses to acknowledge any of the social goals implicit in antitrust.

We may not always agree with Mr. Miller, but we feel that the Federal Trade Commission is the one agency that has acted in the benefit of small business, and has viewed antitrust enforcement not in a vacuum but with an eye toward some social goal—that is, preservation of competition.

Thank you, Mr. Chairman.

The CHAIRMAN. Mr. Blum, thank you.

[The statement follows:]

STATEMENT OF JARED O. BLUM ON BEHALF OF THE SMALL BUSINESS LEGISLATIVE COUNCIL

Mr. Chairman and members of the Committee:

This statement is submitted on behalf of the Small Business Legislative Council (SBLC), an organization of 72 national business and trade associations. In turn, our members represent about 4.5 million small business units covering almost the full range of SIC classifications.

My name is Jared Blum. I am the Chairman-Elect and the Chairman of its Antitrust Committee. I also am Vice President and General Counsel of the Direct Selling Association.

At the outset, Mr. Chairman, we applaud the efforts of this Congress and this Administration to restore fiscal responsibility to all aspects of federal spending. This means that some agency budgets should be cut. It does not and should not rule out, however, a close look at what funds are being cut and by how much. Congress must ask what legislative or executive functions and activities are being curtailed or eliminated, and then determine if the specific proposals are prudent and wise.

The continued existence of a viable and growing small business segment of our economy is not all based on sentiment, a longing for the good old days of the familiar corner store or one man or man and wife enterprise. Thus, Congress and the Executive branch have, over the decades, developed policies and programs which foster and encourage small business. These policies are based on sound and most practical considerations. Chief among these has been the growing recognition that it is the smalls, not the bigs, that lead in the creation of new jobs. It is the smalls, not the bigs, that lead in innovations. Also, it is the small business unit upon which we must rely to provide the essential element of competition so as to protect all of us against the abuses of monopoly power, the deliberate limiting of production to sustain ever higher prices, the divisions of markets and customers, and even price fixing. Our economy today abounds with examples of the influence of new and innovative and sometimes revolutionary products which are the result of small business enterprise.

The Federal Trade Commission (FTC) was organized in 1917 to supplement and further our national policy of encouraging competition in the nation's marketplace and thus to encourage small business. This policy is the antithesis of regulation by government. Rather, the founding of the Federal Trade Commission was an act of faith in the virtues of our free enterprise, competitive systems. The primary and vital mission of the FTC was and has been antitrust, to keep the channels of commerce open and free from the competition-destroying and initiative-deadening monopolistic practices that would otherwise soon emerge.

In furtherance of its antitrust mission, the FTC has proceeded in two special and quite unique ways. First, under Section 5 of the Federal Trade Commission Act, the Commission can reach those acts and practices that tend to be destructive of competition and tend toward monopoly, whether engaged in by one firm or by several. The Department of Justice cannot do this, for they must prove the existence of a conspiracy or alternatively, something close to actual monopoly under the constraints of Section 2 of the Sherman Act. Thus, The Department of Justice does not have the legal means to challenge individual conduct that is undesirable as being anticompetitive, unless they are dealing with a monopoly situation. These are not the usual kind of cases.

Briefly stated, then, it is the FTC and only the FTC that can control most individual conduct that is undesirable as being anti-competitive and inconsistent with accepted competitive business conduct.

The second unique area of FTC antitrust enforcement is that the FTC—and only the FTC—enforces the Robinson-Patman Act. To preserve competitive opportunity for small business, Robinson-Patman was enacted to stop in their incipiency anticompetitive practices which have plagued this country. Essentially, the Robinson-Patman Act is intended to ensure that small businesses can buy on the same terms and conditions as can large businesses. It forbids price discrimination between purchasers of goods of like quality in interstate commerce, where the effect of such discrimination "may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

We are aware of the critics' charge that Robinson-Patman results in higher prices to the consumer. We are not aware of any factual data to support the charges, nor do we think the charge can withstand careful scrutiny. Essentially, the Act requires that the same prices be made available to all with adjustments based on cost-justified volume and other legitimate factors. If a manufacturer, for example, sells at his lowest reasonable price to all, then all customers will benefit through the ensuing price competition of healthy, vigorous dealers.

The Robinson-Patman Act is a fundamental antitrust statute that demands the total support of government. The Small Business Legislative Council was pleased to learn during recent hearings before the Small Business Committee that the Bureau of Competition has launched over a dozen Robinson-Patman investigations, from which several complaints have issued over the past year.

While the Commission has not always exercised good judgment in the area of consumer protection, as a matter of history, it has been the FTC that has been sensitive to the needs of small business, that has been sympathetic to the problems visited upon a small business when its larger competitors seek to obtain an unfair advantage and oppress their smaller rivals. In such instances the FTC has been willing to employ its legal mechanisms, its jurisdiction, to help keep the competitive contest a fair contest. History teaches that, left to its own devices, with no enforcement of the rules of fair play, competitive processes do not continue to exist. They are soon destroyed, and monopolies emerge. This, in turn, inevitably leads to an outcry for regulation by government, which none of us wants.

With the above as a background, we wish to address the specific question now before this Committee. We have grave concern about using the budget process to emasculate the Commission's historic mission. The Commission's budget should be maintained at levels consistent with vigorous antitrust efforts. We are not in a position to specify what funding level is appropriate. However, it seems clear to us that continued diminution in the agency's appropriations can only result in the eventual loss of capability to fulfill basic objectives—both antitrust and consumer protection—that all observers can agree upon. A viable independent regulatory agency, one that is unyielding to political pressures, is essential. You have that in the FTC.

Related to our concern over an actual diminution of the Commission's enforcement mission is the question of the closing of FTC Regional Offices. The small business community certainly opposes the wholesale closing of such offices, and we are pleased that an agreement has been reached which ensures continued FTC presence at all FTC regional offices. Though we recognize that difficult decisions must be made in light of budgetary constraints, this Committee should make it clear that the FTC is still expected to perform its competition protection mandate in regional markets. While we are not suggesting that the regional offices abandon their consumer protection role, we do believe that the states can better handle increased responsibilities in the consumer protection area than they can in traditional antitrust enforcement. Small business needs an antitrust presence—a cop on the beat.

But more than just a presence is needed. The injured small business proprietor may and does call on the Regional Office to give voice to his competitive problems. A trip to Washington, D.C. is, for the most part, out of the question. Available time and money simply do not permit a trip of this nature to be made by most small business firms. Moreover, to attempt to develop the pertinent facts by correspondence with a distant office would be frustrating and inadequate exercise.

Since the issue before this Committee is reauthorization, we have focused this statement on the need for the agency and adequate funding for its activities. However, we also wish to express concern over legislative proposals that are not before this Committee today but upon which its members may have to vote in the future. It is somewhat distressing for the small business community to continually have to "defend" the FTC against proposals to reduce or restrict its jurisdiction made over the past several years. The Commission has made errors, no one would deny, and the 1980 FTC Act amendments have gone a long way to curb some abuses like the children's advertising rule and unfair subpoena enforcement procedures, to name a few. But the ink is barely wet on the 1980 proposals, and a new set is being prepared, many of which the SBLC has significant problems with accepting.

For example, legislation is pending before your Committee which would exempt State regulated professions from FTC jurisdiction. This could prove most unfortunate for small businesses that utilize all sorts of professional services. Furthermore, while no one would question the authority of a State to regulate purely instrastate activities, it is entirely another matter to arbitrarily limit the Commission's legitimate Federal jurisdiction over the activities of professional groups whose activities impact upon or are part of interstate commerce. It seems to us that it would be folly to deprive the Commission of the flexibility of addressing itself to significant regional issues concerning professional groups and thereby render such groups above the law that applies to the rest of us. We have seen antitrust concepts improve consumer welfare in the area of professional activities, securities regulation, real estate and legal services to name but a few. There is no reason to think that such benefits will not continue under current enforcement plans.

Other proposals, which may have more meritorious intent, such as clarifying the meaning of "unfairness" as it relates to the Commission's consumer protection function may be premature. Though predictability in law enforcement is a desirable goal, the Commission recognized the strictures that existing law imposed on its consumer protection mandate. In addition, the judiciary has carried out its obligation to flesh out Congressional intent as it concerns the language "unfair . . . or deceptive acts or practices."[1] In our judgment, a careful and precise analysis must be made of any proposed changes in section 5 even if not directly connected to the Commission's antitrust mission. We respectfully suggest that this is not the time to accomplish such an analysis. Is it necessary at this time to engrave in statute what the Commission has already adopted as its policy? The Commission could always implement this standard through regulations. Why not see how the FTC's "substantial consumer injury" approach works in practice before enactment of strict and complex statutory standards.

Mr. Chairman, much has been said and written over the past two years about the Administration's antitrust policies. The small business community has virtually given up on the Department of Justice as its leadership refuses to acknowledge any of the sound goals implicit in antitrust. We may not always agree with Chairman Miller, but we feel in many areas he is neaded in the appropriate direction and appears committed to enforcing the law even if, such as the case in resale price maintenance, he does not agree with the present state of the law in that area. The antitrust statutes were not enacted based upon the premise that "economic efficiency" is the sole guidepost for enforcement of those laws. Maintenance of competition, especially small business competitors, should be a goal of antitrust enforcement. We live in an imperfect world, and the FTC is unquestionably an imperfect agency, but it continues to be the best hope small competitors have to insure fair marketplace behavior. This Committee should give a strong vote of confidence to this agency and its jurisdiction and let it get on with its job.

In conclusion, small business appreciates the opportunity the Committee has provided us to be heard on a matter of urgent and vital importance. We are pleased that you have allowed us to present our views and look to your continued interest in these questions.

DIRECT SELLING ASSOCIATION,
Washington, D.C., April 12, 1983.

Hon. BOB PACKWOOD,
U.S. Senate, Russell Senate Office Building,
Washington, D.C.

DEAR SENATOR PACKWOOD: Many thanks for your recent letter and your kind words regarding my testimony before the Senate Commerce Committee regarding the Federal Trade Commission authorization.

In response to the questions you posed for the minority members of the committee, the following answers should be included in the record: (1) Is resale price maintenance law "confusing and convoluted?" Not really. Application of the per se rule to resale price maintenance allows a retailer and his supplier to understand the parameters under which a supplier operates with regard to retail price. Implementation of punitive or other measures to force a retailer to adhere to a dictated price by a wholesaler is illegal. Proponents of flexibility or implementation of "rule of reason" in the area of resale price maintenance would be more likely to instill confusion in this area of the law rather than clarification.

(2) Limiting the application of "unfair methods of competition" solely to violations of sections one or two of the Sherman Act? Any restructuring of the commission's jurisdiction which limited its ability to reach incipient activities or other activities which may not fall under the narrow rubric of sections one and two would be highly detrimental to the small business community's interest and would be strongly opposed by SBLC. It is clear that the "unfair methods of competition" of section five of the FTC act allows the Federal Trade Commission the necessary flexibility to attack predatory activities, such as attempts to monopolize, which may cause substantial harm but do not fall within necessary "likelihood of success" of the Sherman Act mandate. It is clear that a limitation of the FTC's jurisdiction regarding unfair methods of competition is merely a first step in the argument to abolish the jurisdiction of the Federal Trade Commission in the antitrust area completely and this would be catastrophic to the small business community.

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[1] The Supreme Court at a very early stage in the Commission's development took the opportunity to remind everyone that the judiciary would carry out its constitutional role as concerning Section 5. In *Federal Trade Commission* v. *Gratz* (253 U.S. 4216 (1920)), the court upheld the original Section 5 provision and reminded us that, although the words "unfair method of competition" are not defined and their exact meaning is in dispute, "[i]t is for the courts, not the commission, ultimately to determine as matter of law what they include." 421 U.S. at 427.

I trust these answers have been responsive to the questions posed by minority members. If I can be of any further assistance, please don't hesitate to contact me.

Sincerely,

JARED O. BLUM,
Vice President and Legal Counsel.

The CHAIRMAN. Mr. Silbergeld, we have to go vote, and we unfortunately will not be back for about 15 minutes. I have got some questions for all of you, and I apologize for the interruption but it should be very short.

[Recess.]

The CHAIRMAN. OK. Let us see if we can finish up before the next vote.

Mr. Silbergeld, go ahead.

Mr. SILBERGELD. Thank you, Mr. Chairman.

I would like to address my remarks at this time to the issue of statutory provisions on deception. I would point out first that "deception" and "unfairness" are not interchangeable. They usually appear together because good lawyers, when they can, and if there are not reasons not to, plead in the alternative—which is to say that a particular pattern or practice may violate this provision; it may violate that provision; it may violate only one; or it may violate both. It need not be a question of ambiguous definition. You do not know—until after you have seen what offers of evidence are accepted and what weight is given to the evidence that is accepted and what the other side has to say, which one, if either—and maybe both—you hope to win.

The CHAIRMAN. It is the same theory of joining as many defendants as possible.

Mr. SILBERGELD. That is right.

The CHAIRMAN. You are not quite sure who is liable.

Mr. SILBERGELD. That is right. So to say that they are interchangeable is not accurate, and I will not take any more time on that point. But I think the record should be clarified.

To put the "deception" definition question into context, you are hearing two different signals. The advertisers are telling you that if you define "deception" it will clarify the law and give advertisers better guidance. Chairman Miller is telling you that if you define deception by statute it will narrow the law and help the Commission to allocate its resources to focus only on important cases. Neither of those things is true.

The definitions that are being offered, the various definitions, do not clarify. They are not definitions in the dictionary sense of clarifying an ambiguity. They are definitions in the legal and statutory sense of defining the elements of proof which the prosecuting agency must meet in order to be successful in a proceeding. Rather, they will increase the proof, either the difficulty of proof or the cost of proof, and perhaps both in many cases, which the Commission must meet in prosecuting all but the open and shut deception cases.

Chairman Miller is just plain wrong that they will help the Commission to allocate its resources. First of all, I do not think he understands yet—although he has been there for almost 2 years—the process. He is complaining about the Commission's issuance of complaints. There is no way that a definition in the statute is going to prevent the Commission from issuing the complaint unless it fully passes on the staff's version of the evidence before it issues the complaint; and it is not supposed to do that.

In the last decade, as you know, we have heard complaints from advertisers that the Commission hears too much of the staff's version of the facts to be offered in proof before it decides whether to issue the complaint. The advertisers' complaint is that this practice constitutes prejudgment of the facts, that the Commission is acting both as prosecutor in issuing the complaint, and as jury before the fact in hearing all the facts before both sides had put in the evidence.

So it is not going to be—although it may prevent the Commission from winning some cases that it would win under the present case-law precedent definition of "deception"—it is not going to prevent the Commission from issuing complaints that they should not issue.

Indeed, Commissioner Douglas would go a step further. He says a statutory definition would prevent the Commission's staff from undertaking preliminary investigations that it should not undertake. He said that in his testimony before you Wednesday on the *VW* case. That is not true, either, and I do not think he has been there long enough to reach that conclusion; and if he does, he is just plain wrong.

The Commission will allocate its resources according to the wisdom of the Commissioners and the political guidance that it gets from the Congress, and no change in the statute will affect that.

As to the advertisers' point, I do not think that putting in a requirement, for instance, that the consumer must have acted reasonably in the circumstances tells anybody what "reasonably in the circumstances" means. The Commissioners will continue to differ over what is reasonable in the circumstances——

The **CHAIRMAN**. As they would if you had a test of "reasonable substantiation" of ad claims.

Mr. **SILBERGELD**. Exactly. And with respect to "detriment," another element that has been proposed to be included in the definition, I can only tell you that Chairman Miller himself has been all over the place and inconsistent in explaining how that would apply.

For instance, he says that if you label as Kosher a hot dog that is not Kosher, or as a vegetarian product a food product that has meat in it, that is deceptive despite the lack of economic harm. But if you sell somebody a tube of denture cream at a low price, that price is so low that that does not constitute substantial harm despite the fact that there is some economic loss. And having said that, he then turns around to a third case and says that if a furniture advertiser engages in false advertising that causes you to go all the way across town to find out that he is not selling what you want, that the cost of the trip across town, the loss of the family's leisure time on a Sunday afternoon, is sufficient harm to permit the Commission to bring the case.

So what we have is one of the proponents of the definition applying the definition in the examples that he posits in such a way that it is clear that we do not know what it will mean when we get it.

The CHAIRMAN. Please abbreviate the rest of your statement, because I have got questions to ask before we vote again.

Mr. SILBERGELD. I think I can say that I am finished at this point, and your questions will probably get to anything I leave out.

[The statement follows:]

STATEMENT OF MARK SILBERGELD, DIRECTOR, WASHINGTON OFFICE, CONSUMERS UNION

Mr. Chairman and Members of the Committee, Consumers Union [1] appreciates this opportunity to address the issues that are before you in the process of reauthorizing the operating powers of the Federal Trade Commission. The FTC's effectiveness is crucial to the pocketbooks of American consumers.

We continue to be very concerned about—and to oppose—proposals by FTC Chairman Miller and by certain industry interests to define by statute "deceptive acts and practices," a key term in Section 5 of the Federal Trade Commission Act.

We also oppose any exemption for commercial advertising from the FTC's power to prohibit unfair practices through rulemaking.

We oppose as well any ceiling on civil penalties that the Commission is authorized to obtain in proceedings in the Federal courts against violators of FTC orders or rules.

And we urge the Congress to authorize appropriations in sufficient amounts to ensure the agency's effective operation, include maintenance of its field offices.

DECEPTION

Chairman Miller and various industry interests continue to urge the Congress to define "deceptive acts and practices," a key provision of Section 5 of the Federal Trade Commission Act. These proposals are ill-founded.

In 1980 the FTC underwent a firestorm of criticism from Congress and the advertising industry, among others. Most of that criticism was couched in such terms as "an agency run amok," "bureaucracy out of control" and "an agency meddling with social engineering." Whether these criticisms were right or wrong, the fact is that those subject to FTC jurisdiction had full opportunity to voice their criticisms of the agency. By and large, they convinced the Congress to limit the FTC's powers in those respects most troublesome to the agency's critics.[2]

But in 1980 nothing was heard from the advertising industry about the lack of a statutory definition of the term "deceptive" in Section 5. Indeed, this cry was not even heard first from industry. It came from the agency's then new Bureau of Deceptive Practices Director, Timothy Muris, and from its then new Chairman, James C. Miller, III.

Their criticism surfaced not in the form of an analysis and proposal but in the form of ad hoc criticisms of selected past FTC cases, many of them old and many of them improperly analyzed. And Chairman Miller did not include it in his prepared testimony before the consumer Subcommittee in March, 1982, but delivered it extemporaneously at the end of his prepared remarks. It took the FTC several days after the hearings to make public the list of cases to which he had referred. When Mr. Miller testified at House subcommittee reauthorization hearings last April, his list was subsequently updated to be more fully descriptive and to include more cases. Only then did Chairman Miller offer specific statutory language for Congressional consideration.

More significantly, only then did the advertising industry in general express support for the concept of defining "deceptive" by statute. And the industry's own proposed statutory language was not released until almost two weeks after the House hearings had concluded.

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[1] Consumers Union is a nonprofit membership organization chartered in 1936 under the laws of the State of New York to provide information, education and counsel about consumer goods and services and the management of the family income. Consumers Union's income is derived solely from the sale of Consumer Reports, its other publications and films. Expenses of occasional public service efforts may be met, in part, by nonrestrictive, noncommercial grants and fees. In addition to reports on Consumers Union's own product testing, Consumer Reports, with over 2.8 million circulation, regularly carries articles on health, product safety, marketplace economics, and legislative, judicial and regulatory actions which affect consumer welfare. Consumers Union's publications carry no advertising and receive no commercial support.

[2] It is a widely accepted myth that the FTC in the 1970's acted contrary to the expectations of the Congress. In fact, the agency merely got caught in a rather abrupt and drastic shift in those expectations as the composition of the Congress and of this Committee underwent change. See B. Weingast and M. Moran, "The Myth of the Runaway Bureaucracy—The Case of the FTC," Regulation, May/June, 1982, p. 33.

Mr. Miller and Mr. Muris are quite frank about the purposes that they believe a statutory definition of "deception" would server. They feel that the Commission often has used its resources unwisely to litigate cases that either were unimportant to protection of consumers or actually injured consumers in such ways as limiting the availability of useful information. They believe, unsoundly in my view, that such a definition would prevent the Commission from bringing cases they consider not to be a good allocation of resources.

The advertisers are now riding on Mr. Miller's initiative with the lame excuse that in 1980 they believed it inappropriate to ask Congress for this statutory definition. In fact, in 1980 the advertisers asked Congress for everything they though was feasible. It is difficult to understand why the advertising industry wants to create a return to the kinds of advertising seen in the nation's media throughout the 1960's that lead to the revitalization of the FTC under President Nixon and to the FTC's flurry of legal action against deceptive advertising in the 1970's.

The Committee should be mindful, as it entertains pleas to enact an untested definition of deception, that the advertising industry—at the same time it promotes this result—also urges Congress to exempt it from the FTC's "unfairness" jurisdiction, leaving "deception" as the only consumer protection standard to which it would remain subject.

On the merits, what is wrong with a statutory definition of deception? A great deal. In 1914 and 1938, when Congress enacted the Federal Trade Commission Act and the Wheeler-Lea Act, respectively, it decided not to define with particularity the specific business practices that would violate the law. Indeed, the very reason for creating a Federal Trade Commission was Congressional recognition that it could neither foresee the infinite and ever-evolving way in which some businesses would act unscrupulously, nor could it rush to amend the statute every time such a practice was called to its attention. In its wisdom, Congress decided that only an expert Commission paying full-time attention to business practices could decide what practices would injure consumers and competition.

That wisdom is no less sound today. Further, since the meaning of the term "deceptive" has been defined on a case-by-case basis for the last sixty nine years, abandonment of the case law of deception, in favor of new statutory language not derived from case law, would create uncertainty, indeed the potential for chaos. Neither would consumers have any confidence that practices they reasonably consider to be deceptive would be unlawful under the new test, nor would the advertising industry and its legal counsel have any way to know what practices, long-since ruled to be unlawful or lawful under the deceptive practices doctrine, would remain so.

If certain actions are deemed undesirable by society, it is appropriate to prohibit them specifically. But when what is undesirable is not the action but its actual or potential effect, then it is wiser to prohibit that effect. That is what the Congress did in 1914 and in 1938; it is reasonably well understood by advertisers, their agencies and their lawyers. I doubt that the more difficult of advertising industry decisions about proposed advertising claims would be made any less difficult by a shift in the method of determining unlawfulness. These evaluations would, will if anything, become more uncertain. In fact, no definition of "deception" that is being urged upon the Congress is a "definition" in the dictionary sense of clarifying the meaning of the term. Rather, proponents seek the adoption of a "definition" in the legal sense of specifying new elements which the Commission would have to prove in order to prevail in a Section 5 deception case. Chairman Miller has been frank that he is seeking a narrowing of the FTC's power, not a clarification of terms.

The proposed element that to have been legally deceived a consumer would have to have "acted reasonably in the circumstances," for instance, does not define what is reasonable in the circumstances. Adopting a statutory definition that includes this term clarifies only that the Commission must prove it. But the parties through their lawyers and expert witnesses, or the Commissioners in the exercise of their expertise, still will fight over what was reasonable in any given set of circumstances. It is usually the simplicity or complexity of the facts of the case, not the meaning of the term "deception," that makes difficult cases difficult under Section 5 of the FTC Act.

There is no basis in Chairman Miller's case analysis for concluding that the current case-by-case method of defining deception produces serious FTC resources misallocation problems that would be cured by his or the advertisers' proposed statutory amendment. The cases he cites are mostly old. They do not support his arguments for a more restrictive definition of deception; collectively, they certainly do not support the case for a definition by statutory amendment.

Commissioner Douglas, who recently joined the Commission, supports Chairman Miller's quest for a statutory definition of the term "deception." I regret to report that the evidence he offers is no more sound than that offered by Chairman Miller.

In recent House testimony, Commissioner Douglas called attention to AHC Pharmacal, Inc.,[3] a case in which the Commissioner claims the FTC took a highly effective treatment for the symptoms of acne off the market simply because its advertisements may have represented the product as a cure, rather than a treatment of symptoms. That characterization of the AHC case is highly inaccurate and the history of the case is hardly so simple.

In AHC, the manufacturer advertised that "The Acne Problem is Over." In fact, at the time of the advertisement, the Food and Drug Administration had not yet found any acne treatment to be safe and effective in treating the symptoms of acne (there is as yet no approved "cure" for acne); FDA was then in the process of evaluating the effectiveness of acne treatment products. The manufacturer entered into a consent order agreement to disclose that there is no known cure for acne and to publish corrective advertisements in a specified schedule of publications.

After the time the manufacturer and the FTC staff signed the proposed consent order, but before the Commissioners accepted the order and published it to the public, the manufacturer realized a substantial loss of sales. As a result, it decided that it could not afford corrective advertising. Rather than continue to market the product through corrective ads, the manufacturer decided to discontinue marketing the product. Thus, the FTC did not, as Commissioner Douglas asserts, remove the product from the market.

Subsequently, the FDA found the product's active ingredient to be effective for treating the symptoms of acne. The manufacturer then requested the FTC to modify the order and the Commission agreed to do so; among the modifications is the elimination of the corrective advertising requirement. The manufacturer is now free to market the product without incurring the expense of corrective advertising, if it chooses to do so. It may not, however, claim the product to be a cure.

Thus, what occurred was not overzealous FTC interpretation of an advertisement and an unfair FTC decision to take a product off the market (which, in fact, it has no power to do). Rather, there was a proceeding against a clearly false "cure" claim for a medical product that had not yet even been found effective by the FDA, the agency which is responsible for such determinations and which is legally required to remove ineffective drug products from the marketplace.

Circumstances not caused by the FTC resulted in the manufacturer's inability to market the product because it could not comply with a consent order that it believed it could live with when it entered into it. Once the FDA made a determination that assured that the product could continue to be marketed under the Food, Drug & Cosmetics Act, the manufacturer and the FTC entered into a revised agreement that permits the manufacturer to resume marketing of the product if it so chooses.

Given the full circumstances, it is unclear what objection to the current caselaw on deception the AHC case can be claimed to illustrate. It is inconceivable that this situation in any way supports the claimed need to define "deception" by statute. What it does illustrate is that the claimed need to define "deception" by statute continues to rest heavily upon the mischaracterizations of FTC decisions.

Nine major issues are raised by the various amendments proposed by Chairman Miller, the American Advertising Federation, the Association of National Advertisers and the American Association of Advertising Agencies. There may well be others. I believe that a review of these problems is convincing evidence that a statutory definition of "deception" is unwise.

State law.—First, the proponents of proposals to define "deception" argue that such a definition would have no affect on "deceptive practices" jurisprudence under state Little FTC Acts. But state attorneys general believe that state law is likely to continue to follow FTC case law development;[4] it is unlikely that state courts will undertake an elaborate process of determining, in a case that FTC loses on appeal for failure to meet elements of such an amendment, whether FTC would have won under the now existing standard. At the very least, I urge you to consider carefully the views of the National Association of Attorneys General before accepting any representation by Chairman Miller or the advertisers that they have found a way to insulate state deceptive practices law from this proposed change in the federal law.

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[3] 95 F.T.C. 528 (1980), mod. Docket No. C-3017, February 1983.

[4] See, e.g., letter from Jim Smith, Attorney General, State of Florida, in "FTC's Authority Over Deceptive Pricing," p. 162 Subcommittee for Consumers, Committee on Commerce, Science and Transportation, 97th Cong., 2d sess., July 22, 1982.

Reckless disregard.—This standard is one used in some criminal matters and as a standard for tort liability. There is no experience in applying it to marketing practices regulation. In the areas of law where it is utilized, monetary penalties or damages may be assessed for a first violation. Adopting it as a statutory standard for determining the lawfulness of deceptive acts or practices will give the Commission no guidance.

The advertising industry may argue that this standard will preserve the advertising substantiation requirement (which it continues to support), but it would appear not to do so. The industry's argument is that making an objective performance claim without substantiation constitutes reckless disregard of the truth or falsity of the claim. But if the proposed standard is adopted, every advertiser will have some shred of substantiation in the file in order to avoid its application; indeed, there will be an incentive to develop bogus substantiation in order to avoid application of the standard. That will force the FTC to look at the quality of substantiation in many more cases than it does now.

Deception by omission.—The advertisers' proposal to utilize a "reckless disregard" that would only declare acts or practices to be deceptive if the respondent made an affirmative material representation. It does not appear to apply to misrepresentation by material omission, even though deceptive advertising law doctrine clearly prohibits deception by omission and even though many important FTC decisions rest on the omission doctrine.

It is unclear why an advertiser should be permitted to engage in knowing deception by omission of material fact or in deception by omitting material facts with reckless disregard for the effect of the omission on the truth or falsity of the advertising claim. The advertisers may claim that FTC could reach material omissions, nonetheless, under their proposed "misrepresentation" test. But this test would require proof of substantial consumer injury. There is no apparent reason why the Commission should have to prove substantial injury, having already proved that the advertiser has made a claim that omits a material fact with knowledge that it is material to the consumer's buying decision. This proposed standard would greatly increase the difficulty of proving the unlawfulness of deception by ommission.

Misrepresentation.—The second test proposed by the advertisers would reach "misrepresentation," rather than false representations. This appears to be a broader standard than the first test. But it does not explicitly reach all three of the categories of deception now reached by the present deception standard—falsity, misleading acts or practices and material omissions of fact.

Foreseeability of consumer injury.—At first blush, this element of the advertisers' second test appears to be intended to retain the "capacity to deceive" doctrine, which permits the FTC to conclude based on its own expertise that consumers may be injured by an act or practice without having to produce a "body count." But it is unclear on the face of the proposed amendment to whom the injury must be foreseeable—the actual advertiser, the FTC based on its own expertise, a reasonable advertiser, a reasonable person, a reasonable rugged individualist? This element typifies the kinds of legal questions that will be raised and subjected to endless litigation if efforts to codify standards for unlawful deception prevail.

Substantiality of consumers' economic injury.—This element of the advertisers' proposed second test raises all of the questions raised by others' proposals to introduce benefit-cost evaluations into a definition of deception. What is substantial injury? Is it measured on a per customer basis or in the aggregate? Can the FTC act against a practice that deceives ten million people out of $4 each—or one that deceives four million people out of $10 each? Can it take into account how many other practices also impose small but measurable economic injury on a typical consumer? Is it more than the price of one tube of denture cream, but less than the cost of a trip across the town in the family car, as Chairman Miller's various statements on the subject would suggest?

How much harm per consumer constitutes substantial injury? Does the answer depend on whether most sellers of a relatively inexpensive item make the same deceptive claims, so that the consumer must incur the expense repeatedly in order to discover that the claim cannot be believed no matter which competitor makes it? Does the standard permit or require FTC to offset injury with benefit; if so, how does the FTC evaluate a few large injuries against many small benefits where there is a net benefit?

While the justification for adding an economic injury requirement to Section 5 is to give FTC guidance in avoiding trivial cases, this and other standards to date proposed for that prupose introduce more uncertainty than they solve.

The "reasonable consumer" standard.—The advertisers' proposed second test would require FTC to show that the act or practice would injure a consumer who was "acting reasonably in the circumstances." As FTC Commissioner Bailey has suggested, that standard gives the Commission no guidance. What if fifty thousand Ph. D's are taken in by a practice that seems when described in the complaint to have been laden with signals to "reasonable" consumers not to be fooled? Is the Commission restricted to evaluating the evidence as to the respondents' practices, or can it take the demographics of the "body count" as evidence that enough "reasonable people" were fooled to establish that a "reasonable consumer" would be fooled? Or is, as FTC Commissioner Bailey fears, the "reasonable consumer" merely one who was not fooled?

This element, also, is justified by the asserted need to give the FTC guidance in avoiding trivial cases, but it creates many more questions than it answers—and makes the questions it raises litigable.

Underlying justification.—Despite the fact that the 1980 FTC reauthorization process was "open season" on the agency, not a peep was heard from the advertisers about the need to address the "deception" concept of Section 5. What happened between 1980 and 1982 that the advertisers can point to as having created that need?

Viability of the proposed tests.—The course of the proposals to define "deception" by statute has been frustrating for those concerned that a change in the standard will result in confusion and less protection for the consuming public. As questions are raised about each proposal, the author provides a response that is, in effect, "don't worry, it will work."

We believe that the burden of establishing the viability of any change in the standard from those constituted by the present body of case law lies with the proponents of change. And that burden is far greater than "Do not worry." The authors of the proposals for statutory definitions of "deception" must apply their proposed standards rigorously both to the body of cases that have been previously discussed in this debate and to a selection of cases that all agree were appropriate for the FTC to bring. The results of the objective analysis must be that foolish cases are indeed excluded from the definition of "deceptive" and the "good" cases not only included but not substantially more expensive to bring or more difficult to prove. Additionally, reasonable hypothetical "good" cases should meet the test as well.

Until this analysis has been made and passes these tests, we do not believe that the Subcommittee has before it for serious consideration any valid proposal to define "deception" by statute.

COMMERCIAL ADVERTISING EXEMPTION

There is no apparent reason why commercial advertising, as contrasted with other forms of product and service marketing, should enjoy a special exemption from the FTC's application of the "unfairness" doctrine through rulemaking. The exemption was included in the 1980 reauthorization act as a Congressional moratorium on the then-pending children's advertising rule.

That proposed rule has been abandoned by the FTC. The Commission has articulated to the apparent satisfaction of both the House and the Senate its standards for determining whether an act or practice is unfair under Section 5. Further, the bill reported by the Energy and Commerce Committee last year would have required that any FTC unfairness rulemaking be predicated on the Commission's finding that the practice in question is prevalent.[5] All of these considerations give commercial advertisers as much protection as they can reasonably claim from proceedings founded on an unclear or undefined premise.

PENALTY CEILINGS

The Committee may be asked to place a ceiling on the amount of any civil penalty the Federal Trade Commission is permitted to collect through proceedings in the federal courts against parties that violate FTC orders or rules. Such a ceiling is unneeded and would undercut the very purpose of civil penalties.

The courts must remain able to assess civil penalties that are proportionate to the defendant's actions under the circumstances. The courts take into consideration such factors as (1) the good or bad faith of the defendant in violating the order, (2) injury to the public from defendant's violation of the order, (3) defendant's benefit, if any, from violation of the order, (4) defendant's ability to pay the penalty, and (5) the deterrent effect of the penalty upon defendant and upon others.

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[5] H.R. 6995, 97th Cong., 2d sess., Section 4.

The penalty must be based upon the seriousness of the defendant's violations. Otherwise, it does not serve the purposes of a penalty. If the Congress now focuses only on the issue whether the lack of a penalty ceiling theoretically could in some instance result in an inappropriately large penalty, and not as well on whether a ceiling could result in frequent disregard of FTC orders, then it is easy to predict that in some future reauthorization hearing you will be asking witnesses how to cure the problems caused by the penalty ceilings.

Therefore, we urge the Committee to take a longrange, comprehensive view of the penalty provisions in the Federal Trade Commission Act.

FIELD OFFICES

Proposed reductions in budget levels as well as Chairman Miller's personal preferences resulted in a recent FTC decision to close four regional offices. After consultation with the Appropriations Committees, the FTC decided, instead, to leave those offices open but greatly reduce the number of field personnel.

The FTC's field offices are important to the agency and to the public. They contribute significantly to the work of the agency, especially but not solely in its enforcement functions. Much of the agency's investigatory expertise is in its regional office personnel. Further, the regional offices give the agency a local presence that cannot be realized from Washington. Small businesses, especially, rely on the nearby presence of an FTC regional office for prompt action when they allege violations of the antitrust laws enforced by the FTC.

The Committee should authorize appropriations levels that will keep all of the FTC's regional offices open at approximately fiscal year 1982 levels. In addition, it should provide that any closing or substantial reduction of regional offices must be matched by the reduction of headquarters office non-enforcement bureau personnel. This will assure that the Commission either in meeting budget restrictions or as a matter of policy does not unnecessarily remove its enforcement capabilities and presence in the field.

SUMMARY

We again thank the Committee for this opportunity to testify. We hope that the bill you report will protect consumers from "deceptive practices," as they are currently defined, from unfair practices engaged in by commercial advertisers as well as by other marketers, from an unwise limitation on civil penalties which would undermine the FTC's enforcement abilities, and against the unwise reduction of its enforcement capabilities and presence through its regional offices.

[The following information was subsequently received for the record:]

CONSUMERS UNION,
Washington, D.C., April 6, 1983.

Hon. BOB PACKWOOD,
Chairman, Committee on Commerce, Science, and Transportation,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: The following are responses for the record of the March 18th hearing on reauthorization of the Federal Trade Commission to two questions transmitted for my consideration by your letter dated March 28:

Question 1. If a cap on civil penalties of $500,000 or $100,000 were set, what practical effects would that have?

Answer. If a penalty cap is set, then the next time the FTC is up for reauthorization—or the time after that—the Committee may very well expect to consider proposals to remove the cap in order to protect the integrity of the FTC's cease and desist orders. Setting a cap would remove the power of the federal courts to set order violation penalties that are commensurate with the violation and that constitute incentives for the firm under order to discontinue violations, as well as for others not to engage in violations. It is difficult to believe that there will not be situations under a penalty cap system in which it pays for the respondent to continue violating the FTC order.

Arguments have been made that the stigma of a civil penalty is sufficient to prevent continued, willful violations. If that were the case, then there is no need for the cap because there is a strong disincentive to engage in violations that may justify such large penalties. However, that has not always been the case. Orders do not always involve marketing of products or reputation-sensitive firms.

What is lacking is not instances of violations justifying penalties higher than the amount of the proposed caps but, rather, evidence that the courts have imposed unjustifiably larger penalties.

The cap proposal is based solely upon speculation that an unjustifiably large penalty may someday be imposed. It does not look to the primary purpose of civil penalties, which is to create an incentive for compliance with FTC orders. No penalty provision that potentially applies to both large and small firms, to both willful and good faith violations, can serve the purpose of deterrence if it has a cap geared only to prevention of potentially disproportionate penalties. It must also address deterrence of egregious violations. Preventive measures against abusive penalties already exist in the criteria the District Courts apply when assessing the penalties and in judicial review of the penalties by the higher federal courts, as well as in the oversight powers of the Congress.

Question 2. Do you believe Chairman Miller's proposal to define "deception" will keep the FTC from bringing "silly" cases?

Answer. No. Nothing will keep the FTC from bringing silly cases if it has the incentives or the bad judgment to bring them. And Chairman Miller's proposal, despite all of the justifications, revisions and refinements turned out in its support by the Bureau of Consumer Protection, remains vague in concept and capricious in proposed application.

Even if Chairman Miller were to develop a generally accepted protocol for the initiation of "deception" cases, that protocol would not necessarily prevent an occasional "silly" case from slipping through. What Chairman Miller somehow overlooks is that the Commissioners do not review the entire case, including physical and testimonial evidence, prior to issuing the complaint in a case. His repeated claim that particular cases would not have been brought (i.e. complaints issued by the FTC) based on his post hoc analysis of the evidence submitted at trial, if a narrower definition of "deception" had been in effect, ignores the FTC procedure which limits the Commissioners' review of the evidence supporting the complaint to that necessary to make a public interest finding.

If the Commissioners were to undertake to review the evidence in detail before issuing complaints, as would be necessary to effect Chairman Miller's theory of preventing "silly" cases, this Committee would soon hear different, "due" process prejudgment objections to FTC advertising cases.

The best preventive against "silly" cases is for the Congress to signal the FTC that it wants only serious cases brought and that it will stand behind the Commission against business community political complaints so long as FTC does not wander into the area of "silly" cases. Coupled with regular oversight hearings, such a signal from the Congress should keep the FTC on a straight and narrow path.

I hope that this information is useful to the Committee in its deliberations on FTC reauthorization legislation. If I can provide any further information, please do not hesitate to call on me.

Sincerely,

MARK SILBERGELD,
Director, Washington Office.

The CHAIRMAN. Let me assure you again, because you were good in getting your statements in, any statement that is in by last night I read in its entirety. Most of them have been in before that. So that I am reasonably versed in what you are talking about.

I am going to start with Mr. Rein. In your testimony you cite a variety of cases in support of your proposal to limit the FTC's antitrust authority. Yet, all of these are either still in litigation or they have been rejected by the Commission or reversed by the courts. I am curious, specifically, about what it is you are driving at. I would think almost all of those cases would prove the point, except those that are still in litigation that you don't need the changes that you are suggesting.

Mr. REIN. Well, Senator, I think there are a couple of points to make on that.

First, we put forward these cases as indications of situations in which the Commission had read that mandate in a way that led it to waste a lot of resources. If you take the *Reuben Donnelley* case, for example, it was reversed by the second circuit, although the Commission, I would add, has not accepted that reversal. It continues to apply its own decision in that case, notwithstanding the court's decision.

The CHAIRMAN. But of course that is not limited to the FTC. All agencies do that on occasion, including the IRS, until you have a Supreme Court decision.

Mr. REIN. That may be true, Senator. I think our point is that if the Congress changed the law, the Commission would not be able to embark on that course of action. They are doing it because they think the statute is broad enough to sustain their reading.

In the *Cereal* case, if you look at the votes in that case, while the Commission did elect not to pursue it further, it was clear that they were not rejecting the underlying theory and, if anything—if I read the decision correctly—they are saying that Congress at this time does not like it, so we will stop doing it, and we will bring it back and fight another day.

What we are saying is that Congress had good reason not to like that kind of case. It did not have any real competition policy benefit, and the only way you are going to stop this endless process of testing the waters is for the Congress to intervene legislatively.

I can go through the rest of the cases. Some of them are pending before the Commission. Our purpose in putting them in was to show that we were not just jousting with a ghost; that we were worried about things that had actually happened that were going on that we believe should not be going on, and which were inspired only by the looseness of the Commission's present mandate. If you would like me to, I could comment on the rest. That was the point of putting them in there.

The CHAIRMAN. As I understand it, you are suggesting limiting the FTC's antitrust authority so that it is coextensive with the Sherman Act, and this will help preserve, if I understand your testimony, the present structure of dual antitrust enforcement with the Justice Department.

It seems to me that it is just the opposite. If you have got absolutely dual jurisdiction for one law, then eventually the argument is going to be made that we should get rid of one of the agencies that is enforcing it.

Mr. REIN. Senator, that was carefully considered by the Chamber. We know that you can glibly say: Well, if there is one law and two enforcers, then one is a waste of time. When we looked more closely, as we did, at what job both those agencies are doing, what tools they have and where they go with that job, I think we feel that our policy makes sense. Let me briefly explain——

The CHAIRMAN. Let me interrupt you here. Do you not think part of the tools they have is the fact that the enforcements that they are undertaking are slightly different based upon slightly different laws?

Mr. REIN. Well, the laws today are slightly different.

The CHAIRMAN. Yes.

Mr. REIN. But we think that where they do differ, the extension of the Commission's authority is wrong. We think the Sherman Act broadly expresses national competition policy, but we think it lends itself both to criminal enforcement, much of the kind the Justice Department does, where there are——

The CHAIRMAN. So you think the FTC could do exactly the same thing they are doing now, given the exact same law that the Justice Department is now enforcing?

Mr. REIN. I did not say they could do the exact thing they are doing. I said they could play a role in competition policy.

The CHAIRMAN. OK.

Mr. REIN. I think what we have in mind is: There are many cases that the Justice Department elects not to bring because they involve complicated economics. For example, the courts have ruled that territorial restraints vertically imposed are not per se offenses. In the Justice Department's enforcement program it does not make a lot of sense to bring those cases because you have to bring them under the "rule of reason." You have to tie up juries; you have to tie up judges; you have to tie up Antitrust Department resources that could be used to pursue horizontal price-fixing or other per se offenses.

The Commission can bring those cases because it has the resources to make economic judgments whether, on balance, that activity is pro- or anticompetitive. It is Sherman Act activity, but it lends itself to administrative adjudication before an expert body.

What we are saying is: You do not need to have two laws to recognize that within a competition policy you have different modes of administration. There are in our view lots of cases in which Commission administration, Commission enforcement makes a lot of sense in the Sherman Act, and where Antitrust Division enforcement does not make a lot of sense, and is routinely avoided because it does not make sense.

So we think you are going to get a better enforcement of the Nation's primary competition law by giving those two agencies both a coterminous mandate, but a very clear understanding of where their different expertise and skills lie. This is, after all, a budgeting process as well.

The CHAIRMAN. I will bet you anything that if the law read the way you say, it would not be 2 years before groups would be in here saying, let's get rid of, and then interestingly it would not always be the FTC. There are some of the larger corporations in this country that would just as soon get rid of the Department of Justice's enforcement and live with the FTC. It would depend upon who had been prosecuting who under the circumstances.

But there would be the clear argument—I can just see it now—budgetary argument, we do not need both of these agencies.

Mr. REIN. Senator, I do not think that budgetary argument is necessarily beaten by an argument that the FTC has a broader mandate. Indeed, that is what has inspired most of the effort to get rid of it. If we were really planning to get rid of it, we would like to leave it with the loosest, most amorphous, most dangerous jurisdiction it had so we could come up here and tell you that it is so dangerous it has to be put out of existence. I think you get rid of rabid dogs a lot faster than you do dogs that are healthy.

The CHAIRMAN. Mr. Blum, I am curious about your comment on the same question.

Mr. **Blum**. Mr. Chairman, the small business community would be very concerned about any effort to restrict the jurisdiction in the antitrust area to Sherman for the FTC. The Commission as it now exists under section 5 can get, as I stated in my testimony, at insipiencies and activities on the part of the companies that ordinarily are not covered by Sherman.

For example, a predatory pricing situation or a group boycott situation in which there is an attempt to monopolize that may not indeed have a real chance of occurring still could damage a small business, or any competitor in a certain marketplace, and there should be a method of redress through the Federal Government.

There has been no evidence shown that the FTC should not serve the purpose for which it was created in 1914: to establish an expert body of law, as well as administrators, in the area of competition law.

The **Chairman**. Mr. Rein, why do you limit your action in "deception" to "substantial economic injury to consumers"?

Mr. **Rein**. Well, let me say as background, Senator, as you know we are defining both "unfairness" and "deception." I guess that is a two-part question: Why do we say "substantial," and why do we say "economic."

The **Chairman**. Also, why "consumers"? Why limit it to consumers?

Mr. **Rein**. Well, Senator, we are not dealing here with unfair methods of competition. A deception which caused a material injury to another business traditionally is actionable as an unfair method of competition, and I think it is also actionable under the Lanham Act.

So in this section, or in this particular amendment we were dealing with consumer injury because unfair acts and practices——

The **Chairman**. So you had no intention to limit it in the other area?

Mr. **Rein**. I think that we do have a view, Senator. Let me make clear that the chamber's view is that where you have consequences flowing between businesses, the courts are available and open to them both under Federal law and State law, and it is not particularly the FTC's role to become a forum for involving itself in business disputes. So that is a separate view.

But in this particular statute, we were limited to consumers because we are dealing with those provisions of the Wheeler-Lea Act amendments.

The **Chairman**. So let us go on, then, to the "substantial" and the "economic." Why do you limit it to that?

Mr. **Rein**. We limit it to "substantial" for the same reason the Commission chose those words in dealing with unfairness: the Commission should not be pursuing trivia; there are many other avenues of relief open to consumer malpractice at the State level and the local level. Not only do we have in mind better business bureaus, but actions in tort, and actions by state consumer administrations.

When you ask the question: Why should the Federal Government involve itself in dealing with the day-to-day practices of the marketplace, we believe that that kind of intervention is justified only when something substantially injurious is going on. If there is trivial harm, it does not make a lot of sense to us for the Commission to be spinning its wheels and wasting its time on it.

We can go through the cases we have cited to the committee before in which we consider that the harms were trivial and the Commission was essentially pursuing whims and the kinds of things that have undermined public confidence.

Why "economic"? I think again we are concerned about free speech implications, and we are concerned about the job of the Commission. We believe that Commission sits as a national body to deal with injuries to consumers' pocketbooks. Once we get beyond that and we get into the concept that, for example, a consumer parent is injured when he is nagged by his children to buy something that the parent does not want to buy, we do not think that there is any federally authorized body that ought to be intervening in that, and we do not think that giving them a mandate to deal with injuries other than injuries to the pocketbook makes a lot of sense.

Now I could talk about the same cases that Mr. Silbergeld did, and I think in our view what Chairman Miller is saying is that if you can show that as a result of a statement a consumer has been put in a position where his expenditures or his loss of resources is meaningful, then you have got the kind of thing that Federal agencies can deal with. They can weigh the pros and cons.

If you claim that the consumer's psyche is injured in some way, or he is "offended" by what he saw, then you are on very dangerous grounds, because the kind of balancing you do and the kinds of justifications you use for intervention comes very close to first amendment limitations.

Why "substantial"? Because that is what we think is a good test for Federal intervention.

Why "economic"? That is the only area in our judgment in which this Commission ought to be intervening. It should not be intervening in emotional and psychological problems.

The CHAIRMAN. Or health, which is not economic in the direct sense that you mean it.

Mr. REIN. Well, I am not sure about "in the sense that we mean it." If somebody is induced to buy a remedy, waste their money on a remedy that does not work, Senator, that is clear to me as an economic injury.

The CHAIRMAN. No matter how small?

Mr. REIN. I think when you are talking about "substantial economic injuries," you are either talking about an injury which is small in one case, but aggregates to a larger——

The CHAIRMAN. The product that costs $1.19 spread all over the country, nobody is significantly substantially economically injured, but it is a clear fraud.

Mr. REIN. But substantial injury to consumers, since we use the term in the plural, is clearly present in that case.

The CHAIRMAN. That is what I want to make sure of.

Mr. REIN. We are not disputing that, Senator. So if you get into health care, we are saying that you have got to have some measure of the harm; and that measure comes from either the waste of consumer money or—and I am sure that people could prove this—if people are induced not to take treatment they need to take, alternatively, and thus wind up either with loss of life or injury of that kind, or additional hospitalization, that has a huge expense and there are all kinds of studies documenting the economic costs of hazardous materials and/or failure to take preventive measures.

We do not think there is any difficulty in defining those economically.

The CHAIRMAN. Mr. Silbergeld, let me ask you this. Let us assume that commercial advertising is excluded from the unfairness authority. Do you have any concerns then about the proposed definition of "unfairness"?

Mr. SILBERGELD. Well, I am concerned about defining "unfairness" by statute regardless of who is covered by it, though not because I believe that the Commission's protocols are in any way inadequate to either allocate the Commission's resources in that area, or to give notice to parties that might be subject to a proceeding as to what criteria are used to measure unfairness.

Rather, I am concerned about putting them into the statute because I believe that it may signal the courts that there is some change in the basis on which the Commission may proceed in unfairness cases, simply because Congress has chosen to act.

I am concerned more about the definition of "deception" if commercial advertising is exempted from the unfairness doctrine.

The CHAIRMAN. Well, if they are exempted totally from unfairness and you define "deception" wrongly, then you have almost no tool.

Mr. SILBERGELD. That is right. You do not know, and you cannot know ahead of time, what gaps you are creating into which some commercial advertising practices may fall. I think that the advertisers are asking too much if they are asking to have it both ways: To be excluded from the unfairness coverage, and the Congress undertakes any, no matter how innocuous it may seem, definition of "deception" by statute that creates doubt as to what practices remain illegal that were previously declared deceptive.

The CHAIRMAN. I do not find the business community united on wanting to codify "deception" at all.

Mr. SILBERGELD. Oh, no.

The CHAIRMAN. They are even split on "unfairness," but when it comes to "deception," if I wanted to line up several panels of witnesses from business—and I mean significant business—I could line them up who would say we would just as soon have no codification and keep it the way it is.

Mr. SILBERGELD. No question. General Foods is on record as opposing it. Commissioner Bailey in her statement last year in the deception hearings that Senator Kasten held identified other business organizations that expressed either opposition or doubt to the wisdom of defining "deception" by statute.

The CHAIRMAN. Bob?

Senator KASTEN. No questions. Thank you.

The CHAIRMAN. Fellows, I do not think I have any more, either. This will conclude our 3 days of hearings on the FTC. We will see where we come out. Thank you very much.

[Whereupon, at 11:35 a.m., the committee was adjourned, subject to the call of the Chair.]

ADDITIONAL ARTICLES, LETTERS, AND STATEMENTS

STATEMENT OF HON. JAMES A. MCCLURE, U.S. SENATOR FROM IDAHO

Mr. Chairman and Members of the Committee, I appreciate the opportunity to appear before you today to discuss the reauthorization of the Federal Trade Commission.

I commend you and the other members of this committee for the thorough and thoughtful manner in which you have been approaching this important issue.

My concerns about the actions of the FTC have been known for some time. For three years I have lead the movement in the Senate to clarify the role of the FTC relative to professionals. During the 96th Congress, the Senate came within two votes of agreeing to clarify the jurisdiction of state-regulated professionals by the Federal Trade Commission. In the last Congress, the House of Representatives voted overhelmingly (254-155) on the FTC Reauthorization bill to place a moratorium on any new FTC actions against the professions.

During the "lame duck" session last December the Senate Appropriations Committee approved an amendment to the continuing resolution offered by my colleague from New Hampshire, Mr. Rudman. His amendment placed a needed, and very welcomed, restraint on the FTC's unwarranted incursions into the professional sphere. However, I am extremely concerned that it did not go far enough. It seems to me that many areas of legitimate professional activity would still be left to the FTC's notorious fishing expeditions and disruptions. Perhaps more importantly the amendment does not protect professional associations and the beneficial, voluntary self-regulation they promote.

As I interpret the Rudman language, the FTC would still be able to attack a State's procedures for disciplining lawyers. The voluntary board certification system in medicine would still be subject to the Commissions meddlings. Cost containment activities undertaken by a variety of health professionals would be subject to FTC challenge. Certainly, in this time of rising health care costs, this Congress should not take any action that would prevent doctors, dentists, nurses, and others from coming to grips with this difficult problem.

I think we can all agree that the types of activities I have just montioned have merit and are in the public interest. They should be allowed to continue unhindered. The conference Committee on the continuing resolution agreed with these thoughts and felt that it would be better to delete the Rudman amendment and leave this area of jurisdiction up to the 98th Congress.

During the 97th Congress a majority of the members of this Committee agreed with me and during consideration of the FTC Reauthorization bill the committee adopted an amendment offered by Senator Stevens that would have resolved the problem. That amendment was taken from S. 1984, a bill I introduced last Congress with a bipartisan group of sponsors from this Committee. Unfortunately, due to time constraints and other problems, Senator Kasten was unable to bring the bill to the floor.

When the Committee reported out the FTC Reauthorization bill the report included the following comments: It is "the Committees belief that the regulation of professionals by the Commission is unnecessary and inappropriate in light of the other extensive State and Federal regulatory and oversight authority. First, the Commission's antitrust enforcement authority largely duplicates U.S. Department of Justice, State, and private enforcement authority. The Department of Justice has criminal as well as civil authority to enforce the Federal antitrust laws, and State attorneys general and private parties injured by antitrust violations may also sue professionals and recover treble damages. In addition, in many States, State antitrust laws cover professionals.

Second, the Commission's consumer protection enforcement authority duplicates the States' well-developed, traditional licensure and regulatory schemes for professionals. Indeed, some of the Commission's proposed consumer protection rules, such as the two eyeglasses rules currently under development, are a direct repudiation of the States' regulatory role, in that these rulemakings contemplate preemption of

State laws designed to govern professional practice. The Committee believes that State goverments are the more appropriate entities to regulate the practice of professionals and that Commission intervention through its consumer protection jurisdiction is unwise and unwarranted."

These comments are still accurate and I feel strongly that a majority of the Members of the 98th Congress agree that we must place a lid on the FTC's continued attacks on the professions. Clearly, the issue should be resolved during this Congress within the confines of the FTC reauthorization and not on any appropriations bills.

Earlier this year representatives from the professions began meeting with officials at the FTC in an effort to work out an agreement. Last month I met with representatives from the professions and Mr. Miller to lend my support to these important discussions. I am hopeful that an agreement can be worked out. However, it is essential that this agreement be a true compromise. I am concerned about any agreement that does not clarify the problem but merely grants the FTC jurisdiction. My objective is to take any assumed jurisdiction away from the FTC.

It should be very apparent that this is not a "different Commission" under Chairman Jim Miller. Last fall the FTC began another initiative against the Maine Medical Association—taken after them for doing no more than supplying fee information to the State Medicaid agency as required by state law for the purpose of holding down costs. This indicates the FTC has not altered its impression that it has the authority to set aside state laws. Nullification of state law is an act of the utmost concern and must be approached only with the highest regard for our federal system of shared power among the states and federal government. The FTC's actions to date in this area amply demonstrate its insensitivity to federalism. Further, there is no basis in the law for its forays against traditional state responsibilities. The time is now for Congress to declare that such involvement is out of bounds for the FTC by firmly establishing that the Commission has no authority to preempt acts of our state legislatures.

Voluntary self-regulation is in the public interest and it is the responsibility of the Congress to preserve this right to professionals. The continuation of this tradition of public responsibility has served the country well and is essential if we are to remain a free society. I am not advocating that professionals disregard regulations that are established under the scope of federal and state law. Effective jurisdiction exists within the Department of Justice and at the state level. From March of 1980 through October of 1982 there were 54 health-care anti-trust court cases pending. All were prosecuted by the Justice Department; none by the FTC. This indicates that the FTC keeps its cases tied up inside the Commission and does not allow them to get to court where a fair trial can be obtained. By keeping cases tied up inside the FTC, professional groups are forced into costly legal battles until they give up and sign consent decrees or some other settlement argeements. This also indicates quite clearly that the professional area can and will continue to be enforced extensively by anti-trust laws.

Again, I would like to thank this Committee for allowing me to share my views on this important matter. I believe the language this approved last Congress would have settled the acrimonious debates that have surrounded the FTC in recent years and would be an excellent starting point for any agreement worked out during the 98th Congress. It is important that the Commission be freed from political disputes so that it can devote its energies to fair and effective enforcement of the law. This is the direction that this country is taking and this is the direction that any agreement should take.

STATEMENT OF THE AMERICAN COLLEGE OF NURSE-MIDWIVES

The American College of Nurse-Midwives (ACNM) is convinced that the jurisdiction of the Federal Trade Commission is of vital importance to childbearing age women, their families, nurse-midwives and their physician collaborators. The care provided by certified nurse-midwives is an example of a health care option which has all the markings of a healthy marketplace competitor: it is in demand, it is cost-effective and it is of high quality. If our society is to have an economic system which allows professional health care services such as those provided by nurse-midwives to flourish, then the federal government has a national obligation to provide a marketplace which supports competition among health care providers.

The American College of Nurse-Midwives strongly supports contunuation of Federal Trade Commission jurisdiction over the professions. Certified nurse-midwives, their physician collaborators and consumers often encounter anti-competitive practices which keep costs to consumers high, restrict access to safe, high quality alternatives and restrain the trade of physicians and nurse-midwives.

The FTC has used all of its avenues of action—law enforcement, informal counseling, economic studies and testimonies—to assist nurse-midwives. The experience of the last few years shows that the FTC's law enforcement actions and the deterrent affect of threatened enforcement actions most effectively enable the FTC to assist nurse-midwives and their physician collaborators. Federal Trade Commission intervention in California, for instance, significantly helped in opening the doors of two major hospitals to nurse-midwifery practice. The FTC's willingness to testify and the perceived threat of a law enforcement action played a major role in defeating restrictive regulations proposed by the Kentucky state medical board.

The laws enforced by the FTC are those from which dominant professions have most recently sought exemption. The American College, of Nurse-Midwives is particulary concerned that a strong law enforcement capability, and strong anti-trust and consumer protection laws, be retained in any authorizing legislation considered by the Congress. It is obvious that without the authority to enforce pro-competition and consumer protection laws, the FTC's other activities would have substantially less power to influence marketplace behavior.

Approximately 2,700 nurse-midwives have graduated from ACNM accredited education programs and been certified by the ACNM. The American College of Nurse-Midwives and is the professional association for certified nurse-midwives in the United States and is autonomous from all other professional organizations and speaks for its members on all issues affecting the practice of nurse-midwifery.

The College has defined nurse-midwifery practice as "the independent management of care of essentially normal newborns and women, antepartally, intrapartally, post-partally and/or gynecologically. This occurs within a health care system which provides for medical consultation, colaborative mangement, and referral and is in accord with the 'Functions, Standards and Qualifications for Nurse-Midwifery Practice' as defined by the ACNM." An ACNM survey, conducted in 1976–1977 showed that nurse-midwives delivered one percent, or 33,000 of the babies born in the United States that year.[1] It is reasonable to estimate that certified nurse-midwives are currently delivering at least two percent, or 66,000 babies in the United States each year.

Since nurse-midwifery practice came to this country in 1925, nurse-midwives have worked closely with consumer activists to improve the delivery of health care to childbearing age women and their families. Consumers participate more actively and with greater influence in childbirth care than in other segments of the health care market. Beginning in the early 1900's and dramatically increasing with the "natural" or prepared childbirth movement in the 1940's, consumers have been questioning medical practices and creating options in the forms of practice in childbirth. The childbirth activists have recently been joined by citizens from the consumer movement, the women's movement, the women's health movement, and the environmental movement. As a result, the clinical and business practice aspects of women's health care have undergone enormous change in the last decade.

Consumer forces in the obstetrical market often coalesce around nurse-midwifery services. Nurse-midwives have been pioneers with consumers in changing childbirth care in the United States. In the 1970's, affluent women began seeking nurse-midwifery care which, until then, had been available almost exclusively to indigent women. Nurse-midwives, who had worked almost exclusively as employees in the public sector, began entering a variety of private practice business arrangements with their physician collaborators. The traditional characteristics of nurse-midwifery care which would seem to make it cost-effective—selective use of expensive drugs and technology, lower Cesarean section rates, improved infant and maternal outcome—are now accompanied by new developments in the business of childbirth. Reduction in the length of institutional stay after a normal birth, the use of in-hospital birthing rooms and freestanding (out of hospital) birth centers and home births attended by nurse-midwives opened a variety of economic and high quality choices to healthy women and their families.

Although consumers actively seek nurse-midwifery care, ample evidence proves the safety of nurse-midwifery care and the available economic data suggest nurse-midwifery care is cost-effective, nurse-midwives and their physician collaborators sometimes find themselves unwelcome in the marketplace. The anti-competitive resistance to nurse-midwifery care has been documented and examined three times by the federal government since 1979, once each by the General Accounting Office,[2] the Subcommittee on Oversight and Investigation of the Interstate and Foreign Commerce Committee[3] and by the Federal Trade Commission.[4]

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[1] American College of Nurse-Midwives, Nurse-Midwifery in the United States: 1976–1977, Washington, D.C. 1978.

The resistance to nurse-midwifery practice has come from many sources: individual physicians, professional organizations such as medical societies, specialty medical societies and hospital departments of obstetrics and pediatrics, and from public bodies such as state medical practice boards and health and malpractice insurance companies. The resistance varies in form and may include refusal of hospital privileges, refusal of third party payers to reimburse nurse-midwives, harassment of physicians who collaborate with nurse-midwives, requests for unreasonable payments for malpractice insurance and deliberate misrepresentation of nurse-midwifery to the public. The American College of Nurse-Midwives has recorded 17 instances of hospital privilege problems in 13 states between January 1981 and December 1982. In some cases nurse-midwife/physician teams have had to close their practices. Two nurse-midwife/physician teams have had to resort to filing anti-trust suits in federal court.

While recourse to private suit is always theoretically available, the mechanisms which provide redress from economic injuries are tremendously expensive and burdensome for nurse-midwives and consumers to undertake. Pro-competitive marketplace regulation is best dealt with in the aggregate by an agency with a national perspective, high visibility and the power to enforce strong laws. The FTC has these assets and must retain them in order to have any meaningful, pro-competitive impact on the actions of professionals in the health care marketplace. The FTC's ability to enforce the law in a highly visible, precedent setting manner acts as a deterrent force in the obstetrical marketplace, keeping fair competition open to physicians, nurse-midwives and consumers. American families, certified nurse-midwives and their physician collaborators cannot afford to be without the FTC and its enforcement capacity.

The American College of Nurse-Midwives supported Representative James Broyhill's compromise on the professions issue during the 97th Congress. The College supported the Broyhill compromise because it was a carefully drafted piece of legislation. Complicated proposals which purport to be compromises also have already surfaced since the 98th Congress began. In fact, these are bogus compromises which have the same goal as the exemption legislation of the last Congress. They achieve this goal not by sweeping away the FTC's authority in one large gesture, but by undermining the FTC Act point by point. Representative Broyhill's proposed compromise struck a moderate balance which clarified that the FTC has jurisdiction over the business and commercial practices of professionals and clearly left the sensitive clinical judgments to appropriate state and professional bodies. The College is, of course, willing to work once again with the Committee in drafting legislation which meets the legitimate needs of consumers and professionals. We are not willing, merely for the sake of compromise and achieving an end to this controversy, to support a bogus compromise which in effect renders the Commission unable to address the business and commercial practices of the professions.

The American College of Nurse-Midwives looks forward to working closely with the Committee in drafting a meaningful compromise on this issue for the reauthorization of the Federal Trade Commission.

STATEMENT OF THE INTERNATIONAL CHIROPRACTORS ASSOCIATION

INTRODUCTION

The International Chiropractors Association is pleased to take this opportunity to submit to the Committee the views of our organization as you consider legislation that would reauthorize the Federal Trade Commission.

Our concern is with the FTC activity in the market for professional services, particularly in the health industry. Chiropractors are a licensed health profession in all fifty states plus the District of Columbia. The history of our profession's successful efforts to establish itself in the face of organized medical opposition is a matter of common knowledge. We therefore have had years of firsthand experience with many of the anticompetitive features of the current health care system.

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[2] General Accounting Office, "Better Management and More Resources Needed to Strenthen Federal Efforts to Improve Pregnancy Outcome," Washington, D.C. 1979.

[3] "Nurse-Midwifery: Consumer's Freedom of Choice," Hearing of the Subcommittee on Oversight and Investigation of the Committee on Interstate and Foreign Commerce. U.S. House of Representatives, December 18, 1980.

[4] "Competition Among Health Practitioners: the Influence of the Medical Profession on the Health Manpower Market," a report by Lewin and Associates, Inc., for the Federal Trade Commission, Washington, D.C., February 1981.

As this Committee is aware, costs in the health care industry threaten to escalate out of control. In our opinion, much of this cost escalation can be attributed to anticompetitive practices in the market for health professional services. Price-fixing, professional boycotts, bans on advertising and other restraints have for many years prevented the introduction of innovative health delivery systems and have prevented true competition among competing groups of health providers. The FTC's activity in the health area has focused solely on those "business" aspects of professional practice, activities which are completely unrelated to the legitimate interest of state governments and professional associations in the regulating of the professions. We therefore support the position of the Administration and the Federal Trade Commission in strongly opposing the enactment of a blanket exemption of professional services from FTC scrutiny. We also oppose the enactment of restrictive legislative language concerning the FTC's rulemaking and adjudicatory functions, restrictions which are designed to cripple effective FTC scrutiny of professional services. ICA was very pleased that the previous Congress defeated the so-called "professional exemption" measures and we are confident that the current Congress will also allow the FTC to continue its important role in this area.

THE INADEQUACIES OF STATE REGULATION

We agree with those proponents of limitations on the FTC's jurisdiction over the professions who argue that the regulation of the professions is most properly a matter for state governments working with professional association. Regulation of professional services through state practice acts and through the ethical codes of professional associations has generally served the national interest well in enhancing the quality of health services.

We disagree, however, with the assertion that FTC activity in the market for health professional services has somehow interfered with either the legitimate interest of professional groups in self-regulation or of state governments in regulating the quality and scope of professional practice. There are simultaneous interests which often are not adequately protected by this current system of state-level regulation of the professions. First is the consumer's interest in the freedom to choose among a wide range of quality professional services. Second is the national economic interest in a truly competitive marketplace for professional services. Third is the interest of state-licensed professionals in being allowed to freely compete both among themselves as well as with competing professional groups for the consumer's business. It has been the protection of these interests which has been the focus for FTC activity.

In the health services market, for example, anticompetitive practices of professional groups have all too often frustrated these purposes. Price-fixing, restrictions on advertising, boycotts and other anticompetitive practices of professional groups continue unabated in the health industry. The purported rationale for these restraints is, of course, the maintenance of "professional standards of practice" and the promotion of the "public welfare." The actual affect of such practices is instead to maintain the dominance of one professional group within a particular professional services market, to the exclusion of other competing groups; to keep prices for particular services at artificially high levels; and to prevent the introduction and utilization of competing or alternative services. FTC activity in the health field has focused solely on these "business" aspects of professional practice and on the activities of professional groups which limit competition both among the members of a particular professional group as well as among competing groups of practitioners.

The experience of chiropractors over the years is, we think, instructive. As a major primary health care provider, the chiropractic profession competes with other health providers for the nation's health care dollar. All fifty states have chosen to license chiropractors as a health profession. The federal government has likewise authorized chiropractic services under a wide range of federal health and employee benefit programs, including Medicare and Medicaid. And the public has been seeking out chiropractic care at an increasing rate, with upwards of 122.5 million patient visits in 1979.

Nevertheless, chiropractors in every state in the Union continue to face serious obstacles to the practice of their profession. The difficulties chiropractors have faced in professional practice have been, perhaps, more severe and widespread than those faced by other non-physicians. Yet all health care providers must battle against organized medicine's efforts to restrict their practices and impede their professional development. Such restrictive practices frustrate federal and state health policy in authorizing chiropractic and other forms of alternative health care, and deny the consumer freedom of choice in the selection of health care.

The obstacles to chiropractors' professional practices have taken many forms. For example, a provision in the ethical canons of the American Medical Association, adopted in 1966 and only recently abandoned, had the intended effect of a professional boycott of chiropractors. This provision in the Principles of Medical Ethics of the AMA made it unethical for physicians to have any voluntary professional association with chiropractors. Thus, a physician was prevented from making referrals to or accepting referrals from a chiropractor, was prohibited from teaching at chiropractic colleges or lecturing to chiropractors on medical subjects, and was prevented from any form of collaborative relationship with chiropractors. Once again, the purported rationale for this ethical canon was a concern for the safety and welfare of the health care consumer; instead, the intended effect was to isolate and eliminate yet another form of competition.

This ethical provision, furthermore, denied chiropractors access to many of the back-up services necessary for safe and effective practice. For example, it is a condition of hospital accreditation that hospital medical staff adhere to the AMA's Principles of Medical Ethics. Since this prohibited professional association with chiropractors, hospitals nationwide were prevented, at the threat of loss of accreditation, from providing state-licensed chiropractors with staff appointments, admitting privileges, X-rays, or other back-up services. Chiropractors and their patients were therefore denied access to hospital services and facilities necessary for the delivery of effective health care. Similarly, adherence to the ethical canons of the AMA is a condition of membership in the American College of Radiology, the professional association for radiologists. Radiological services are a major diagnostic tool for chiropractors, and access to such facilities and services is crucial to a chiropractor's professional practices. This ethical canon denied chiropractors access to hospital radiology departments or services, and independent or group practice radiologists were prevented from providing X-ray and other services to chiropractors.

Anticompetitive practices by professional groups often take less obvious forms. One particularly effective method at stifling potentially competitive sources have been to impede the professional and educational development of alternative providers. Thus, since it was "unethical" for physicians to teach in chiropractic colleges or even lecture to chiropractors on medical subjects, the chiropractic profession was cut-off from one potential source of research, knowledge and expertise—much of which has been, of course, generated at the taxpayer's expense. Similarly, colleges and universities seeking collaborative relationships with chiropractic colleges have faced enormous pressure from state medical societies to cease any such joint efforts. For example, one university in New York trying to establish a pre-chiropractic curriculum with a chiropractic college, dropped its plans after facing a vehement campaign against the proposal conducted by the state medical society. This pattern has been replicated in a number of other states as well.

Such actions by professional groups have a cumulative effect throughout the health care system that has proven particularly troublesome in the lifeblood of that system—reimbursement. Chiropractors have frequently encountered difficulty in obtaining third-party reimbursement for their services, even where reimbursement for chiropractic care has been mandated by state or federal law. For example, in many states with Insurance Equality laws, which would require reimbursement for chiropractic care if the same service was provided by a physician would be reimbursed, chiropractors are still often denied payment for their services. Pressure from organized medical groups on Blue Shield and other insurers, themselves often dominated by physicians, have worked in many states to rountinely deny chiropractors payment for services which they are licensed by state law to perform.

In short, anti-competitive practices in the health professional services market continue unabated under state regulation. And attacks on such practices have generally not come from state authorities. For example, despite the severity of the restraints chiropractors have faced in professional practice, only the Attorney General of the State of New York has brought suit to correct this situation. The office of State Attorneys General in most states simply do not have branches devoted to antitrust and trade practice matters. Those few states which do have this expertise often lack the resources for the coordinated enforcement efforts that successful attacks on anti-competitive practices require. State regulatory agencies alone cannot be expected to promote national health policy objectives, nor are they equipped to handle industry-wide marketplace abuses. Lacking the expertise and resources to successfully tackle the quite considerable political and economic pressure of organized professional groups, state governments have generally been unable to combat such practices. Not surprisingly, The National Association of Attorneys General, the chief law enforcement officers of the states, recently adopted a strong resolution supporting continued FTC jurisdiction over the professions.

THE FEDERAL TRADE COMMISSION'S ROLE

In the health care economy, there is a clear national interest in the activities of health professional groups. The FTC is particularly well-equipped to initiate activities which improve competition and increase consumer choice in the health services market.

ICA disagrees with proponents of limitations on FTC jurisdiction who argue that other federal departments and agencies, in particular the antitrust activity of the Justice Department, sufficiently addresses anti-competitive conduct and other marketplace abuses in the professional services market. Despite widespread anti-competitive practices as outlined above, the Justice Department has conducted little activity in the market for health services. The FTC is the only federal agency with a clear consumer protection mandate in this area. Its wide-ranging investigative work allows the development of expertise in specific sectors of the economy that is simply not duplicated by other federal or state agencies. The broad mandate of section Five of the Federal Trade Commission Act allows the FTC to reach anti-competitive practices and consumer problems that are beyond the purview of the antitrust laws and the Justice Department's antitrust activity. Furthermore, the FTC's rulemaking and adjudicatory functions allow the fashioning of industry-wide solutions to marketplace abuses.

In reauthorizing the FTC, we respectfully urge this Committee to reject a sweeping exemption of the professions from the FTC's scrutiny. We also urge the Committee to reject restrictive legislative language, the practical effect of which would be to severely limit the FTC's work in the professional services market: For example, we oppose enactment of sweeping language prohibiting FTC preemption of state law; we oppose enactment of limitations on the FTC's subpoena power; we oppose attempts to circumscribe the term "unfair competition" in the Federal Trade Commission Act; and we support continuation of the FTC's "intervenor program."

In sum, the International Chiropractors Association strongly believes that the FTC has a unique role to play in the market for health professional services. Its activities have emphasized and should continue to promote informed consumer choice of health care, and to remove restraints on the provision of alternative health services. A truly competitive health care market is the key to lowering health care costs nationally. The FTC's past activity in the health area has gone far toward advancing that goal, while at the same time correcting problems which go unaddressed at the state level. We strongly support the FTC's work in this area. The ICA, participating as an active member in the "Coalition to Save the Jurisdiction of the FTC over the Professions," will continue to categorically oppose any legislative attempt to strip the Federal Trade Commission of its current authority in this area.

STATEMENT OF ENDICOTT PEABODY ON BEHALF OF THE NATIONAL MASS RETAILING INSTITUTE

NMRI

The National Mass Retailing Institute ("NMRI") represents 125 discount retail companies with thousands of stores spanning the nation. The annual dollar volume of sales of NMRI members exceeds $60,000,000,000 (sixty billion dollars).

Retailers are crucial to the United States economy, as they are the final step in the distribution chain of America's goods. In serving the ultimate consumers, retailers must anticipate and respond to the demands of the public. In buying from manufacturers, retailers strongly influence the mix of products offered in our economy and the methods of sales employed to distribute goods. Positioned as they are in the market, retailers are well situated to understand not only the needs of consumers to be protected by consumer protection laws, but the needs of distributors to be protected by the antitrust laws. NMRI respectfully suggests that its views on the government's consumer protection responsibilities and the government's antitrust enforcement policies merit close attention. Accordingly, we submit the following comments on the FTC's role as protector of the consumer and as antitrust guardian of the marketplace.

THE FTC

In principle, and most often in practice, the Federal Trade Commission serves as an invaluable enforcer of consumer protection and antitrust laws. NMRI does not urge this Committee to gut the FTC's authority to police the marketplace. To the contrary, NMRI welcomes a fair and vigorous Federal Trade Commission. However, certain important amendments to the FTC's consumer protection charter warrant passage. We also urge that existing antitrust rules banning resale price fixing be vigorously enforced.

1. Amendments to section 5(a)(1) "unfair or deceptive acts or practices"

Nearly all who have submitted comments to this Committee in past years, including the Chamber of Commerce, National Association of Manufacturers, American Retail Federation, and even the FTC itself, recommend that Section 5(a)(1) of the Federal Trade Commission Act be amended. NMRI supports amendments to the "unfair" language of Section 5(a)(1) of the FTC Act. The statutory definition of "unfair" should include three elements which the FTC must prove in order to establish a violation under the "unfair" portion of Section 5(a)(1): (1) the consumer injury should be substantial; (2) the injury from the alleged unfair act or practice should outweigh its benefits; (2) the injury to consumers must not be reasonably avoidable by consumers.

NMRI believes that these three elements do no more than codify the basic premise of our economy: consumers act intelligently in their purchasing decisions. The proposed amendments to the FTC Act acknowledge the rational decision-making of consumers and prohibit the FTC from second-guessing consumer behavior when the consumer, with knowledge of the consequences of his act, chooses not to avoid those consequences. That is, as Chairman Miller stated in his remarks before the Committee last year, "the Commission should confine its activities to curbing [only that] behavior that takes unfair advantage of consumers' inadequate knowledge in reaching a decision on their inability to protect themselves from such behavior."[1]

2. Repeal of section 5(m)(1)(B) and amendments to section 5

At present, Section 5(m)(1)(B) of the Federal Trade Commission Act allows the Commission to impose penalties and behavioral requirements on companies who were not parties to, nor in receipt of, notice and opportunity to be heard in original cease and desist proceedings. That is, the Section allows the Commission to bring an action against any person that the Commission believes is in violation of a cease and desist order entered in prior proceedings against other companies. The only requirement for such a prosecution is that the second company have "actual notice" of the order. The FTC traditionally attempts to prove "actual notice" by the mere mailing of copies of the cease and desist order to members of the industry. In effect, the FTC can promulgate regulations with industry-wide applicability merely by prosecuting a case against the defendant of its choice. The obvious unfairness of that practice merits little further discussion. Accordingly, NMRI recommends repeal of that statutory authority.

Similarly, Sections 5(l) and 5(m) of the Federal Trade Commission Act allow a civil penalty of up to $10,000 for "each violation" of an order of the Commission. Neither section sufficiently defines "violation." NMRI suggests that this Committee consider two modifications to the violation provisions of the Act: (1) the term "violation" should be defined so that punishment is meted out for single decisions rather than for each and every conceivable consequence of a particular decision; and (2) a cap should be placed on the maximum liability of a company for civil penalties.

3. Federal Trade Commission relaxation of prohibition on resale price maintenance

NMRI respectively suggests that the reauthorizaion process can, and should, serve as a vehicle for requiring the Commission to enforce present antitrust laws.

One such antitrust law that is within the Commission's domain is the rule that resale price maintenance is per se unlawful. Under Section 5 of the Federal Trade Commission Act, the FTC has jurisdiction to prohibit manufacturers from engaging in "unfair methods of competition." From 1911 to the present, the Supreme Court has consistently denounced resale price-fixing as a clear per se violation of both the Sherman Act and the Federal Trade Commission Act.

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[1] NMRI believes that further scrutiny of the FTC's conduct in enforcing the statutory prohibition on "deceptive acts or practices" is also appropriate. For example, NMRI submitted comments pursuant to the FTC's Invitation to Submit Written Comments on Possible Revisions to the Guides Against Deceptive Advertising of Guarantees, 45 Fed. Reg. 51836 (August 5, 1980). NMRI contended that the guides are unnecessary in light of the Magnuson-Mass Warranty Act. NMRI does not presently believe that an amendment to the deception language of Section 5 is necessary but does believe that enforcement of that provision should be examined.

Indeed, as recently as 1975, Congress reflected its own view that resale price maintenance is undesirable. By enacting the Consumer Goods Pricing Act in 1975 to repeal the McGuire and Miller-Tydings Acts, Congress endorsed the existing Supreme Court precedent holding that resale price maintenance was per se illegal.

NRMI will not repeat in detail the findings of the 1975 hearings. It suffices to repeat the conclusions: price competition increases sales, adds to consumer welfare, and produces dynamism in the American economy.

As NMRI noted above, retail distributors are the actors best positioned in the marketplace to respond to, and to anticipate, consumers' desires. Retail merchants, not manufacturers, are the most efficient decision-makers on how goods should be priced and marketed. NMRI firmly believes that resale price maintenance by manufacturers works harm on our economy.

Recent statements by Chairman Miller of the Federal Trade Commission suggest that he believes otherwise. Enforcement against resale price fixing has practically ceased, despite its evils. The FTC's own statistics, recently conveyed to the House Commerce Committee, Subcommittee on Oversight, show that in 1979-1981, the FTC opened 83 preliminary investigations where resale price maintenance was the primary charge; in the last sixteen months, that number has fallen to ten. In 1979-1981, the FTC opened 23 formal investigations where resale price fixing was the primary violation; in the last sixteen months, only one. In 1980 alone, the FTC issued eight final consent orders involving resale price fixing; in 1982, only one—and that order, against Onkyo, was stripped of much of its remedial sting.

Chairman Miller suggests that, in certain instances, resale price maintenance enforced by a manufacturer might be a legitimate restraint on trade. His enforcement policies demonstrate his misguided belief. By his speculation, Chairman Miller is at stark odds with the teachings of the Supreme Court, the findings of this Congress, and the overwhelming weight of economic and legal theory. NMRI strongly urges this Committee, as part of the reauthorization process, to instruct the Federal Trade Commission to vigorously enforce the law that resale price maintenance is per se illegal. We hereby submit a lengthy position paper on the subject and ask that it be made part of the record.

We urge this Subcommittee to direct the Federal Trade Commission to enforce the law. NMRI respectfully suggests that the FTC Authorization Bill should contain an explicit directive that resale price fixing is illegal per se and that the Federal Trade Commission should investigate and prosecute the law, rather than ignore it.

Thank you for the opportunity to submit these comments.

Attachment.

SUPPLY SIDE ANTITRUST: DO WE WANT MANUFACTURERS TO FIX PRICES?

INTRODUCTION

Until the present Administration took office, price fixing was thought to be illegal conduct. Manufacturers, retailers, consumers, the judiciary, Congressmen, lawyers, and economists—without exception—believed that our antitrust laws prohibited every form of price fixing. However, in the last two years, the Administration officials charged with the duty to enforce our antitrust laws—William F. Baxter, Assistant Attorney General of the Antitrust Division of the Department of Justice and James C. Miller, III, Chairman of the Federal Trade Commission--have actively argued in the press, before Congress, and to the courts that certain of the antitrust laws which prohibit price fixing are "rubbish" and "stupid."

These officials have fashioned a "supply side" antitrust philosophy by which manufacturers are given freer rein to control every step of the distribution process. The Administration antitrust officials have directed government attorneys to curtail enforcement of the law concerning that form of price fixing known in antitrust jargon as "resale price maintenance." Resale price maintenance is the practice by which a manufacturer requires its distributors to charge a fixed price for a good or a service. It is a price fixing practice that, in short, prevents price competition in the sales of a manufacturer's product.

The purposes of this paper are (1) to demonstrate why the Administration's refusal to enforce the law is of immediate importance to our economy and (2) to provide background information in order to establish the error of the Administration's policies.

THE ISSUES

Two issues are paramount: (1) what should be the substantive rule of law on a manufacturer's attempts to dictate a retailer's prices—should the rule be that resale price fixing is a "per se" violation of the antitrust laws or should such a practice be subject to a more permissive "rule of reason" approach? (2) who should make the decision on the legality or illegality of price fixing—Congress, entrusted by the Constitution to enact the laws of our country; the Supreme Court, empowered to interpret the law; or the Administration antitrust officials, obligated to enforce the laws, as written by Congress and interpreted by the courts.

In discussing those issues, this paper is organized as follows: The issue: what should the law be?

The historical background of resale price fixing.

The development and practice of the Baxter-Miller "supply side" antitrust view of resale price fixing.

The fallacies in the "supply side" view the issue: Who makes the law?

With respect to the first issue—what should the law be—the answer benefits from a brief history of the legal treatment of resale price fixing. A historical review places the present Administration's efforts in perspective—a perspective that demonstrates the audacity of "supply side" revisions to settled antitrust law.

HISTORICAL PERSPECTIVE

The Sherman Act and judicial interpretation

In 1890, Congress enacted the Sherman Act, a statute designed to remedy the anticompetitive practices of large trusts that threatened to dominate the economy. The legislative history of the Sherman Act evidences a Congressional intent to let the entire marketplace—free of private restraints—determine the proper allocation of resources.

The prophylactic statute outlaws every "contract, combination . . . or conspiracy . . . in restraint of trade." From its earliest days, the Act was construed by the courts to prohibit price fixing by manufacturers acting together—regardless of the claimed reasonableness of rates fixed or the manufacturers' motivations in fixing prices.[1] The Supreme Court has long recognized that, because price competition is the "central nervous system" of our economy, any agreement that interferes with the setting of price by free market forces is illegal on its face, as it injures our economic health.[2]

The Supreme Court eventually crafted the so-called "per se" rule of the illegality of price fixing agreements jointly entered into by manufacturers—the rule that price fixing by manufacturers is illegal in and of itself, without any inquiry into the claimed reasonableness of the rates fixed or the motives for fixing prices. This per se rule of illegality is in contrast to a "rule of reason" approach, by which challenged conduct by businesses is examined with an eye toward a variety of factors.[3]

The "per se" rule—that price fixing is always illegal—first arose in "horizontal"antitrust cases.[4] A "horizontal agreement" is an agreement struck by companies—generally manufacturers—occupying the *same* ("horizontal") level of distribution. A "horizontal" agreement is to be distinguished from a "vertical" agreement. A "vertical" agreement is one reached by companies occupying different levels in the distribution scheme, such as a manufacturer and a wholesaler, or a wholesaler and a retailer, or a manufacturer and a retailer.

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[1] *United States* v. *Joint-Traffic Assn.*, 171 U.S. 505 (1898); *United States* v. *Addyston Pipe & Steel Co.*, 85 Fed. 271 (6th Cir. 1898), aff'd, 175 U.S. 211 (1899); *United States* v. *Trenton Potteries Co.*, 273 U.S. 392 (1927); and *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940).

[2] *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 692 (1978), citing Socony-Vacuum, supra n. 1, 310 U.S. at 226 n. 59.

[3] Mr. Justice Brandeis, in *Chicago Board of Trade* v. *United States*, 246 U.S. 321, 328 (1918), issued the definitive statement of the "rule of reason:"

"The true test of legality [under the rule of reason] is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probably. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be obtained, are all relevant facts. This is not because a good intention will save an otherwise objectionalbe regulation or the reverse; but because knowledge of intent may help the court to interpret the facts and to predict consequences."

[4] See note 1, supra.

The per se rule prohibiting price fixing in "horizontal" cases was soon applied to "vertical" price fixing cases as well—that is, where an agreement to fix prices was struck by companies occupying different levels of the distribution scheme. Such an agreement is known as "resale price maintenance" or resale price fixing. It, too, is per se illegal.

In a 1911 Supreme Court case, *Dr. Miles Medical Co.* v. *John D. Park & Sons, Co.*, 220 U.S. 373 (1911), the Supreme Court struck down a resale price maintenance scheme. The facts of the case may be briefly summarized: a manufacturer of medicines, Dr. Miles, sought to fix both wholesale and retail prices of its products. Dr. Miles argued that the "secret formula" used to make its products justified its control of the prices of the goods at all levels of distribution. Dr. Miles obligated its wholesalers and retailers to sign contracts to that effect.

A wholesale drug concern, John D. Park & Sons, sought to introduce price competition into the distribution of Dr. Miles products by buying the products at discount prices and reselling them for discount prices. Dr. Miles sued the Park Company for inducing Dr. Miles' wholesalers and retailers to breach their contracts. The trial court, the appellate court, and the Supreme Court each dismissed the manufacturer's complaint.

The conclusions reached in the Supreme Court's opinion make good sense even today:

(1) All actors involved with the distribution of goods should be accorded some freedom to make decisions; simply because a manufacturer makes the product and initiates the distribution scheme "it does not follow [that] . . . he may impose on purchasers every sort of restriction," [5]

(2) The effects of resale price fixing imposed by a manufacturer are the same as if distributors collectively agreed upon a fixed price.[6]

In sum, the Supreme Court concluded:

"[Dr. Miles] having sold its product at the prices satisfactory to itself, the public is entitled to whatever advantage may be derived from competition in the subsequent traffic." [7]

The ruling in *Dr. Miles*—that retail price fixing is per se illegal—has been affirmed by Supreme Court at every subsequent opportunity it has had to discuss the doctrine.[8] As in "horizontal" settings, price fixing in "vertical" settings disrupts the economy's "central nervous system." Price competition is the most basic tenet of our free enterprise system. The per se rules prohibiting both "horizontal" and "vertical" price fixing reflect a societal judgment that price competition—whether between manufacturers of different products or between distributors of any one manufacturer's product—is desirable.

The Supreme Court maintained this consistent treatment of resale price fixing even at the same time it was uncertain about the proper treatment of non-price vertical restraints, such as restrictions imposed by a manufacturer on the territories where a distributor could market the manufacturer's goods. In a 15-year period, the Supreme Court changed its rulings on vertical territorial restraints no less than three times, first subjecting them to a "rule of reason" approach,[9] then declaring them illegal per se,[10] and finally returning to the "rule of reason" standard.[11]

Despite its revisions to the rule of law on non-price vertical restraints, the Supreme Court has steadfastly upheld the rule of law that resale price maintenace—that is, resale price fixing—is *per se* illegal. It simply cannot be said that the law on this question is uncertain.[12] Indeed, Assistant Attorney General Baxter has, in candid moments, acknowledged that the Supreme Court's ruling is free from doubt—although the precedent is, in his opinion, "very, very stupid."[13]

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[5] 220 U.S. at 404.

[6] Id. at 407–408.

[7] Id. at 409.

[8] E.g., *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 213 (1951); *Simpson* v. *Union Oil Co.*, 377 U.S. 13, 17 (1964); *Albrecht* v. *The Herald Co.*, 390 U.S. 145, 151–152 (1968); *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 51 n. 18 (1977); *California Retail Liquors Assn.* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 102–03 (1980); and *Rice* v. *Norman Williams Co.*, 73 L.Ed. 2d 1042, 1050 (1982).

[9] *White Motor Co.* v. *United States*, 372 U.S. 253 (1963).

[10] *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365 (1967).

[11] Continental T.V., supra, note 4.

[12] For its part, the Federal Trade Commission has also embraced the rule that vertical price fixing is per se illegal, most recently in Russell Stover Candies, Inc.,—F.T.C.—(No. 9140, July 7, 1982), appeal docketed, No. 82–2036 (8th Cir. September 2, 1982) FTC Chairman Miller dissented from that ruling.

[13] Wall Street Journal, Sept. 10, 1982 at 4, col. 2, citing Baxter's testimony before the Senate Small Business Committee.

Fair trade laws

After enacting the Sherman Act in 1890, Congress remained content with that Act's prohibition on resale price fixing until the Depression. Then, in 1937, Congress enacted the Miller-Tydings Act [14] to exempt from the Sherman Act "agreements prescribing minimum prices for the resale of a [brand name] commodity which . . . is in free and open competition with commodities of the same general class produced or distributed by others" when such agreements would be lawful in the State of resale.[15] State legislation authorizing such price-fixing agreements was known, ironically, as a "fair trade" law.

Later, Congress enacted the McGuire Act,[16] permitting States even greater authority to allow a manufacturer to fix resale prices, even those prices charged by distributors that had not signed distribution contracts with the manufacturer. The McGuire Act, in short, authorized a State to permit a manufacturer to impose prices even on "non-signers."

The experience with the Miller-Tydings and McGuire Acts, and the state "fair trade" laws enacted pursuant to those acts, was nothing short of disastrous. Many states repealed or curbed their resale price maintenance statutes, four states held their own statutes unconstitutional, and twenty-five states declared "non-signer" provisions unconstitutional.[17] Congress eventually repealed the Miller-Tydings and McGuire Acts, an event to which we next turn.

1975: Repeal of fair trade

In 1975, Congress enacted the Consumer Goods Pricing Act,[18] repealing the Miller-Tydings and McGuire Acts and thereby revoking the states' authority to allow resale price fixing.

The testimony presented during the House and Senate hearings on the Consumer Goods Pricing Act compelled the conclusion that resale price fixing was causing great economic damage: (1) the practice added to the costs of consumers, thereby increasing inflation; (2) it facilitated price fixing by manufacturers; (3) it retarded the growth of efficient forms of retailing and added unnecessary costs to distribution; and (4) it was not necessary to accomplish any desired social end.[19]

The Antitrust Division of the Department of Justice, the Federal Trade Commission and even President Gerald R. Ford were prominent in leading the charge against resale price fixing. Then Assistant Attorney General for Antitrust Thomas Kauper discussed all of the costs listed above. With respect to higher prices, he noted:[20]

"We believe that the privileged status of resale price fixing under the present law is an unjustified exception to the policy of the antitrust laws, which call for the determination of price by the unfettered interplay of supply and demand in the Marketplace. Repeal of this anachronism will significantly aid the effort against artificially high prices.

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"There is . . . a consensus among observers that the existence of fair trade practices results in higher prices than would otherwise exist. This is corroborated by repeated Government academic studies and Congressional testimony."

Mr. Kauper then summarized some of the compelling economic data.[21]

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[14] Miller-Tydings Act of August 17, 1937, ch. 690, 50 Stat. 693 (amending Title 15 § 1).

[15] The Miller-Tydings Act passed despite the strong disapproval of the President. The Act was hurriedly passed as a rider to a District of Columbia revenue measure, and did not receive careful Congressional consideration on the merits of the controversial aspects of this subject. Hearings on S. 408, before the Subcommittee on Antitrust and Monopoly of the Senate Judiciary Committee, 94th Cong., 1st Sess. 173 (1975) (Statement of Assistant Attorney General Thomas Kauper).

[16] McGuire Act of July 14, 1952, ch. 745, §§ 1, 2, 60 Stat. 632 (amending Title 15, §§ 45, 45 note).

[17] P. Areeda, Antitrust Analysis 517 (1974).

[18] Consumer Goods Pricing Act of 1975, Pub. L. No. 94-145, 89 Stat. 801 (1975) (amending 15 U.S.C. §§ 1, 45(a) (1976)).

[19] Hearings on s. 408 Before the Subcommittee on Antitrust and Monopoly of the Senate Judiciary Committee, 94th Cong., 1st Sess. (1975) (hereinafter "1975 Senate Hearings"); Hearings on H.R. 2384 Before the Subcommittee on Monopolies and Commercial Law of the House Judiciary Committee, 94th Cong., 1st Sess. (1975) (hereinafter "1975 House Hearings").

[20] 1975 Senate Hearings at 173–174.

[21] Id. at 174–175. Mr. Kauper reported the following economic surveys:

Continued

Mr. Kauper also warned that the existance of resale price maintenance *facilitated "horizontal" price fixing* by manufacturers. He noted: [22]

"Price competition at retail may result in increasing price competition at the manufacturer's level. Especially in concentrated industries, manufacturers may well be reluctant to see vigorous price competition at the retail level, since this may threaten general price stability in the industry, and price stability is frequently sought and desired in oligopolistic industries.

"To the extent that these considerations apply resale price maintenance represents efforts by manufacturers or wholesalers to prevent competition among themselves and is clearly not in the public interest . . . . [R]esale price maintenance in effect fosters [horizontal] price fixing, yet enables it to escape the ban of law: two competing manufacturers could not lawfully agree to fix prices, but they can accomplish the same by adopting identical vertical price structures, without recourse to agreement between themselves. Because 'fair trade' legalizes vertical resale price agreements, the urge to establish parallel prices could be great, especially where the manufacturers are few in number."[23]

Mr. Kauper then turned to the damage done to new forms of retailing. Resale price fixing, noted Mr. Kauper: [24]

"Introduces a rigidity and uniformity into the retail price structure, regardless of differing costs and operating conditions among retailers . . . . [C]ontrolled prices do not readily respond to changes in the economic climate.

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"Resale price maintenance may shore up inefficient wholesalers and retailers. It sustains high-margin wholesalers by protecting their high-cost customers from the competition of low-cost retailers. The inefficient wholesaler and retailer are safeguarded against the consequences of their inefficiency by the assured markup maintained by the manufacturer's 'fair trade' program."

Finally, Mr. Kauper dismissed the arguments of those who believed that resale price fixing was necessary to accomplish certain desired goals: [25]

"It has been urged that resale price maintenance laws are needed [1] to provide retailers a fair profit, which, in turn, may enhance the marketability of the manufacturer's product; [2] to aid the small business operator by preventing loss-leader and predatory price cutting by large chain store operations, department store operations, and discount stores; and [3] to maintain or enhance the manufacturer's good will in his product.

"The response to these assertions comes readily to hand . . . .[1] '[F]air trade' minimum prices are high-margin prices, protecting the inefficient and insuring a more than reasonable return . . . . [2] 'Fair trade' is not needed to combat loss-leader and predatory price cutting. There are other laws which adequately serve the purpose . . . . [and] [3] It is doubtful if a product's good name is injured by sale of the product at a low price. There is little or no evidence that the abandonment of fair trading in the 1950s by producers of a number of well-known branded products had any significant impact on public demand for those products . . . . [Indeed], the absence of price competition produces increased advertising and promotions empha-

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"The Antitrust Division's 1970 survey studied the prices at which each of 78 items of 'fair trade' consumer goods sold during the week of June 26, 1970, in 57 discount and department stores in 10 cities in four 'free' states. On the whole, a comparision with the resale prices set by the manufacturers in 'fair trade' states showed that consumers in the free states could purchase more than half the items (45) at less than the 'fair trade' prices. These 45 were sold at prices ranging from two-tenths of 1 percent to 37.4 percent below the manufacturer's 'fair trade' prices.

"A 1956 Antitrust Division survey of eight cities in non-'fair trade' jurisdictions showed that an average of 119 items 'fair traded' elsewhere were available in each of the 8 cities. On 77 of these items consumers were paying in "fair trade" areas. On all 119 items—including some selling at the 'fair trade' prices—consumers in the 8 cities were paying on the average 19 percent less than consumers were paying on the average 27 percent less than consumers were paying for the same brands in 'fair trade' areas."

[22] Id. at 175.

[23] Mr. Kauper also added (id. at 175):

"Furthermore, resale price maintenance provides convenient cover for patently illegal conspiracies in restraint of trade: state 'fair trade' laws give rise to agreements among competing manufacturers, among competing wholesalers, among competing retailers, and among manufacturers competing with others at different distribution levels. Additional activities, such as boycotting of retailers refusing to enter 'fair trade' contracts and the enforcing of resale price maintenance in states without 'fair trade' statutes, have been inseparable concomitants of the 'fair trade' laws." (Footnotes omitted.)

[24] Id. at 175-176.

[25] Id. at 176-177.

sizing product differentiation by brand name. Consumer preferences which give manufacturers a degree of power to exact unreasonably high prices for popular brands are created. And the enlarged reliance upon advertising, promotions, and increased services, because of the need to compete on grounds other than price, results in higher retailing expenses. The consumer gains little, if anything, from the increase in advertising and promotions, and may have little interest in increased services."

Mr. Kauper was hardly alone in his condemnation of resale price fixing. Economists, government officials, and businessmen all joined in the chorus decrying the practice.[26]

In light of the overwhelming weight of the testimony, it is not surprising that a repeal of the Miller-Tydings and McGuire Acts faced almost no opposition; the legislation sailed through Congress.[27]

In effect, then, in 1975 Congress and the President strongly spoke out: resale price fixing is illegal conduct. In the words of Sen. Strom Thurmond, the legislation was necessary because "Congress [could not] continue to sanction price fixing . . ." [28] Representative Hutchinson, the ranking member of the full committee on the Judiciary, articulated the legislator's purpose: [29]

"This bill knocks the legal props from under our fair trade laws. Upon enactment of this bill it would be a violation of the Federal Antitrust Act for a manufacturer to set a minimum retail price for any item he makes; that would be price fixing."

On signing the bill, President Ford announced that the legislation *"will make it illegal for manufacturers to fix the prices of consumer products* sold by retailers. This new legislation will repeal laws . . . which amended the Federal antitrust laws so States could authorize otherwise illegal agreements between manufacturers and retailers setting the price at which a product would be sold to consumers." [30]

One would have expected that subsequent antitrust enforcers would have heeded the instruction of Congress and President Ford by vigorously enforcing the law against resale price fixing. As we shall see, Assistant Attorney General William Baxter and Federal Trade Commission Chairman James Miller did not get the message—or, if they got the message, they have ignored it.

SUPPLY SIDE ANTITRUSTERS: RESALE PRICE FIXING MAY BE GOOD; THE PRESENT LAW IS "RUBBISH"

Despite over 70 years of Supreme Court precedent and Congressional disapproval of resale price fixing, the present Administration—in speeches, Congressional testimony, and litigation—has renounced the rule that resale price fixing is per se illegal.

Public statements

The Administration's campaign to change the antitrust laws surfaced in the press throughout 1981 and 1982. Mr. Baxter and his assistants, in public speeches and interviews, denounced the law on resale price fixing.[31] It often seemed that a week did not go by without a Department of Justice official discussing the inadequacies of the present law and depicting the dangerous presence in the marketplace of a villain known as the "free rider." This miscreant, it was alleged, discounts prices so severely and sells at a price so low that he abandons all services desired by the manufacturer, refuses to make adequate sales efforts, and ignores warranty requirements. To exorcise this devil from the marketplace, Mr. Baxter's antitrust enforcers stated that antitrust law must change and that consumers might need to forfeit the benefits of price competition for their own economic health. (The free rider argument will be taken up in detail below.)[32]

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[26] For example, other evidence included:

"(1) Economist Lawrence Shepard of the University of California estimated that the costs of "fair trade" laws meant $6.5 billion in added costs to consumers each year—and that in 1975 dollars. Id., at 151.

"(2) Howard Useem, an economic analyst with the Library of Congress, cited several studies which demonstrated that:

"the rate of retail business failures in fair trade states was greater than the rate of retail business failures in free trade states;

"there were higher sales per store in cities without fair trade laws than in states with fair trade laws;

"fair trade cost consumers billions of dollars a year owing to substantially higher prices."

Id. at 322-339.

[27] The House voted 380-11 in favor of the bill. 121 Cong. Rec. H7144 (daily ed., July 21, 1975), No Senator rose to speak against the bill and, with bipartisan support, it easily passed the Senate. 121 Cong. Rec. S20874 (daily ed., December 2, 1975).

[28] S. Rep. No. 94-466, 94th Cong., 1st Sess. 7 (1975) (Additional views of Sen. Thurmond).

[29] 121 Cong. Rec. H7104 (daily ed., July 21, 1975). The House Report echoes that statement: "An agreement between a manufacturer and a retailer that the retailer will not resell the manufacturer's product below a specified price is an obvious form of price fixing. As such, it is per se illegal under Section 1 of the Sherman Act . . ." H.R. Rep. No. 94-341, 94th Cong., 1st Sess. 2 (1975).

[30] Public Papers of President Gerald R. Ford, Vol. 11, No. 50, p. 1368 (Statement of President on Signing H.R. 6971, December 12, 1975) (italics added).

Chairman Miller and his staff have also fueled the public controversy by their public speeches. For example, in one interview, Thomas J. Campbell, the Director of the Bureau of Competition (and hence the chief antitrust enforcer at the Federal Trade Commission) agreed that it is "time to reconsider the *per se* rule on [resale price fixing]."[33] Campbell added further that the FTC will not investigate resale price fixing cases unless there is, in his opinion, "consumer harm"—a standard not part of the traditional *per se* test. Indeed, Mr. Campbell's statement is equivalent to a district attorney's refusal to investigate an armed robbery unless the robber succeeded in stealing something from the victim.

To inject their views of antitrust policy into the judicial system, the Department of Justice created the Private Action Program, through which private defendants in antitrust suits were encouraged to "send [in] your box tops" to the Department and thereby solicit the Department's participation in private lawsuits.[34] In effect, the Department of Justice—the world's largest law firm—offered to help companies accused of price fixing by filing supportive briefs.

The change in policy could not have been more startling: whereas the prior Administration considered criminal penalties—including jail terms—for manufacturers that fixed resale prices,[35] this Administration's Department of Justice, in effect, offered to serve as the bail bondsman for the defendants.

Dismissed cases

At the same time that the Baxter Antitrust Division offered its services to accused price fixers, it dismissed government litigation brought against manufacturers engaged in a variety of practices—including price fixing. In 1981, the Carter Administration, under then Assistant Attorney General for Antitrust, Sanford Litvak, had filed a civil price fixing suit against Mack Truck and its National Distributor Advisory Council.[36] Less than seven months later, the present Administration dismissed the suit. While Mr. Baxter stated that the evidence in the case was weak, he also announced that "vertical arrangements [including resale price fixing] do not impair the efficiency of markets or lessen the welfare of consumers."[37] Since the *Mack Truck* dismissal, Baxter's Antitrust Division has brought no vertical price fixing prosecutions. To the contrary, Baxter's Antitrust Division has intervened on behalf of companies charged with price fixing.

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[31] *See, e.g.,* "Some Reflections on Vertical Restraints," speech by Ronald G. Carr, Deputy Assistant Attorney General, Antitrust Division (October 30, 1981); Interview with William Baxter, W. Post, Aug. 13, 1982, at 1, 26.

"Before the American Bar Association Antitrust Section 1982 Annual Spring meeting, Baxter reported that 'a lot of rubbish' had accumulated in antitrust theory in recent years." Antitrust and Trade Reg. Rep. (BNA), No. 1009 at AA-6.

[32] It suffices to say at present that the free-rider argument simply does not hold up. If there are, in fact, free riders, that is companies that do not adequately promote or service a manufacturer's product, the solution is not to eliminate price competition altogether and thereby punish consumers and legitimate discount retailers that serve the public. That cure is worse than any problem. To begin with, even if a retail price is fixed, and a profit thereby guaranteed to a retailer, an unprofessional retailer might still free ride by refusing to provide the services and simply retaining the fixed high profit. Moreover, the solution to free riding is far less dramatic than price fixing; the solution is found in existing antitrust principles. Under present law, a manufacturer can insist that its retailers promote the good, can insist that its retailers provide service and warranty protection, and can insist that goods not be resold or transshipped to dealers that refuse to do these things. And, as incentive to provide these services to consumers, a manufacturer can in most instances give a retailer exclusive accounts or an exclusive territory. Under present law, however, what a manufacturer cannot do is very limited—but is very important to consumers—a manufacturer cannot fix prices.

[33] Interview with Thomas J. Campbell, reported in Daily Exec. Rep. (BNA), July 20, 1982, at A-1.

[34] "Some Antitrust Division Views on Vertical Restraints: Public Policy and Private Actions," speech by Melanie Stewart Cutler, Special Assistant to the Assistant Attorney General, Antitrust Division (December 8, 1981).

[35] *See* remarks of Ky Ewing, May 9, 1980, reported at Trade Reg. Rep. (CCH), Vol. V, ¶ 50,417 (threatening criminal suits for vertical price fixing). In addition, the Antitrust Division under Assistant Attorney General Sanford Litvak in fact brought *criminal* charges against Cuisinarts for vertical price fixing. United States v. Cuisinarts, Inc., Criminal No. H-80-49 (D. Conn., indictment filed Sept. 17, 1980), reported in Trade Reg. Rep. (CCH), Vol. 4, ¶ 45,080 (No. 2798).

[36] United States v. Mack Trucks, Inc., et al., Civil No. 81-0102 (E.D.Pa., complaint fixed January 12, 1981), reported in Trade Reg. Rep. (CCH), Vol. 4, ¶ 45,081 (Case No. 2855).

Government intervention

After announcing his Private Action Program, Baxter's Antitrust Division subsequently intervened in private litigation in appellate courts.[38] Perhaps the most astonishing example of Justice intervention in private suits is the Justice brief in the *Monsanto* v. *Spray-Rite* case, now pending before the Supreme Court.[39] In that case, the Department asked the Supreme Court to review a private lawsuit involving a manufacturer's termination of a distributor of herbicide.[40] A jury had concluded that the manufacturer agreed with certain distributors to maintain the resale prices of the herbicide and, pursuant to that agreement, a distributor selling below that price would be terminated. Monsanto did, in fact, terminate Spray-Rite, a discount distributor. The jury awarded Spray-Rite a damage verdict, a decision upheld by the United States Court of Appeals for the Seventh Circuit. Significantly, in neither the Court of Appeals nor the Supreme Court did Monsanto challenge the continued validity of the per se rule as applied to pure price vertical restraints. That is, Monsanto did not contest the established rule of law that resale price fixing is per se illegal. Rather, Monsanto's petition asked the court to review the sufficiency of the evidence on the finding of an agreement and the jury instruction that non-price vertical restraints could also be considered per se violations of the antitrust laws if they are ancillary to a price restraint.

Ignoring the questions raised by the private parties, the Justice Department urged the Supreme Court to review the case as a method of revoking the 70-year old rule that resale price fixing is per se illegal.[41] The Court has granted Monsanto's petition and could conceivably consider Justice's views in reviewing the lower courts' opinions.

Baxter before Congress

Congress has frequently called Mr. Baxter to task for his unilateral revamping of the antitrust laws.[42] Despite persistent questioning from Congress on his relaxed enforcement on retail price fixing, Mr. Baxter remains unrepentant: in his view, the per se rule on retail price fixing must be changed. As a result, some Congressmen have called for Mr. Baxter's resignation. Mr. Baxter's skeptics do not believe that his arguments justify price fixing. In any event, they contend that Mr. Baxter is not empowered by the Constitution to change the law.

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Having set out above the historical and contemporary backgrounds for these issues, we turn to a brief discussion of these two points:

What should the law be? and

Who is empowered to change it?

Is the per se rule correct? Yes

During the 1975 Congressional hearings, summarized above, the testimony conclusively demonstrated the costs of resale price fixing:

(1) Resale price fixing substantially raises prices to consumers;

(2) Resale price fixing contributes to inflation;

(3) Resale price fixing impedes the development of efficient forms of retailing;

(4) Resale price fixing causes unnecessary expenditures on advertising and frills associated with sales;

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[37] Trade Reg. Rep. (CCH), Vol V, ¶ 50,431.

[38] E.g., *Battle* v. *Lubrizol Corp.*, 673 F.2d 984 (8th Cir. 1982) (United States amicus curiae brief in the en banc proceeding, urging that the *Battle* decision be vacated). See *Pashall* v. *Kansas City Star Co.*, No. 81-1963 (8th Cir., opinion filed December 27, 1982) (rejecting Department of Justice views on merits of monopolist's pricing conduct).

[39] *Monsanto* v. *Spray-Rite*, petition for cert. filed, 51 U.S.L.W. 3461 (U.S. December 7, 1982) (No. 82-914).

[40] Id., Brief for United States (January 3, 1983).

[41] Id., Brief at 13-18.

[42] E.g., Hearings before House Small Business Committee, September 9, 1982; Hearing before Senate small Business Committee, September 9, 1982; hearings before House Judiciary Committee, Subcommittee on Monopolies, February 25, 1982; see also Trade Reg. Rep. (CCH), Vol. 5 ¶50, 442 (letter from Mr. Baxter to Representative McClory (R. Ill.)).

(5) Resale price fixing adds to retail business failure; and
(6) Resale price fixing facilitates horizontal price fixing.[43]

At the same time, Congress found no benefits to resale price fixing. As noted above, the primary argument advanced—both in 1975 and today by Mr. Baxter and Chairman Miller—in favor of resale price fixing is that the practice may be necessary to combat the so-called "free rider." Congress rejected that argument in 1975; all should reject it today.

However, because the "free rider" argument persists, we turn to a detailed discussion of it. Baxter's most eloquent statement of the free rider doctrine is found in a standard 15-page letter he sends to anyone complaining about the Antitrust Division's price fixing policies.[44]

His argument, set out in that letter, may be examined, by premise and conclusion. Each of Mr. Baxter's premises is flawed; his conclusion is not true at all.

Baxter's free rider premises—Baxter premise (1): The free market works

"[T]he preservation of free markets . . . is best attained by minimizing government interference with business behavior. Business units should be permitted to conduct their affairs in accordance with their own perceptions of their own best interests in rivalry with other businesses in the same industries. Businesses should be permitted, with as few exceptions as possible, to enter and to enforce contracts on terms that are mutually satisfactory to the parties to those contracts . . . . [P]rivate agreements should be struck down and punished only where there is a sound economic basis for supposing that the private agreements will hinder, rather than advance, the central objective of efficient resource allocation."

Premise 1: Rebuttal

No one can quarrel with Mr. Baxter's proposition that the "free market" is ordinarily the most efficient method of allocating our nation's resources. However, Mr. Baxter's premise falters by limiting the "free market" to a market where the consumer's voice is muted. His "free market" is a market where a consumer has no freedom to price shop because pricing decisions have been arrogated by one player in the market—the manufacturer. A market is not "free" when an actor at one level—the manufacturer—completely strips actors at other levels of the freedom to set competitive prices. Moreover, as evidenced in the 1975 Senate and House hearings, there is a "sound economic basis" for the per se rule.

Baxter premise (2): Resale price-fixing is a matter of consensual agreement

"[A]greements between parties who perform sequential steps in the process of producing and distributing goods and services . . . are typically conducive to competition and economic efficiency. The negotiation, execution, and enforcement of contracts is an indispensable part of the process of competition . . . . [T]he very purpose of contracts is to circumscribe the freedom of the parties to them in accordance with the terms of their own agreements . . . Distribution of a manufacturer's product by a distributor is a consensual matter, a cooperative undertaking, that should proceed on terms concurred in by each of them."

Premise 2: Rebuttal

Simply because two parties by contract agree to do something does not make their agreement efficient. Baxter's second premise stands all of antitrust law on its head, for it suggests that any two parties may, by private contract, divide markets, boycott certain customers, or fix prices. Simply because conduct occurs in the private marketplace does not mean it is efficient, desirable, or even tolerable conduct. If that were so, polluters would be free to dump wastes wherever they chose to because that was a free market decision; employers would be free to charge less than the minimum wage because the free market permitted it; sellers would be free to sell liquor to minors because minors would buy it. These "free market" examples demonstrate the circularity of Mr. Baxter's premise. Just because the conduct occurs in the free market does not mean that it should be acceptable.

Baxter premise (3): The market will punish economic errors

If a manufacturer mistakenly elects a practice that is not efficient, the marketplace will furnish adequate punishment for that conduct. An inefficient price fixing scheme may be "a commercial mistake, only one of the many commercial mistakes that firms in a free market are free to make; and they would suffer the penalties imposed on mistakes by the process of competition. No government interference would be necessary to bring out the disappearance of the practice."

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[43] S. Rep. No. 94-466, 94th Cong., 1st Sess. (1975); H.R. Rep. No. 94-341, 94th Cong., 1st Sess. (1975).

[44] E.g., Letter to Rep. McClory, cited in note 42, supra.

Premise 3: Rebuttal

Mr. Baxter argues that the marketplace will sufficiently punish inefficient decisions. Congress has concluded otherwise by enacting the antitrust laws. Indeed, if Baxter's premise were correct, Senator Sherman would never have introduced the Sherman Act, as the marketplace would have cured the inefficient and anticompetitive practices of businesses. The simple fact is that certain "rules of the road" must be laid down and enforced—neither manufacturers nor retailers can be permitted total discretion in jointly arriving at business decisions, particularly pricing decisions. The rule that a manufacturer cannot fix a price to be charged by someone else in a subsequent sale seems a modest incursion into the corporate boardroom. This rule does not deprive the manufacturer of the freedom to choose his customers or to set whatever price at which he wants to sell his product to his customers—and the free market will take over once the manufacturer has made his sale. Indeed, the present prohibition of the law on fixing someone else's price is far less intrusive than, for example, wage and price controls.

Finally, even if the market did provide corrective action, why should consumers pay the interim price of a practice that is, nearly without exception, inefficient and harmful?

Baxter premise (4): A manufacturer's motives in imposing vertical price restraints may, in many instances, be pure

"[W]hen [a] Manufacturer . . . employs RPM [resale price maintenance], he is attempting to create, on the part of those distributors who agree to comply, an incentive to handle his product at the distributor's level differently from the way in which it would be handled in the absence of such an agreement—in some way which the manufacturer expects will redound to his advantage in his rivalry with other manufacturers. By setting the distributor's price for each unit above his usual costs of distribution, the manufacturer may hope to induce the distributor to incur additional costs: to engage in more intensive local advertising, or to incur the expense of employing more knowledgeable and more highly trained sales personnel who will increase sales volume of the product by explaining more accurately to customers how the product should be used for best results, or to increase consumer satisfaction with the product by providing quicker and more expert post-sale repair and service facilities. . . . If, for example, a product is technologically complex, its success in the marketplace may well depend upon the availability, at the point of sale, of technically trained sales personnel who are able both to instruct the consumer and to assist him in selecting the model, or the combination of components, that will best suit his individual needs."

Premise 4: Rebuttal

A manufacturer may have a variety of motives for fixing his distributor's prices, many bad and some genuine. Even Mr. Baxter agrees that a manufacturer's bad motive in crafting a resale price fix—e.g., to facilitate horizontal price fixing—is intolerable. He simply believes that in certain instances, the good motives may be distinguished from the bad and, in those situations, the restraint may be justified. However, even acknowledging that a manufacturer may believe that resale price fixing is good for consumers, good motives do not save bad results—and resale price fixing causes bad results. The list of harms caused by resale price fixing has been chronicled throughout this paper and will not be belabored here—the point is simply to demonstrate that Mr. Baxter's good-motives premise is insufficient to overcome the substantial economic harm caused by the practice. Finally, the good effects sought by the manufacturer may be attained in other, far less restrictive, ways.

Baxter premise (5): There are no alternatives to resale price fixing

"[While] the manufacturer might enter into long and detailed conctracts with his distributors, contracts describing exactly how the sales personnel are to be trained and what they are to say to customers[,] . . . day-to-day enforcement of such contracts with a large number of distributors would be prohibitively expensive. Or alternatively, the manufacturer might simply attempt to persuade his distributors that such a selling approach promised the best chance of success and profit, both to his distributors and himself, and to encourage them to behave in that way without a contractural commitment on their part. But a manufacturer with any sense who takes this last course will be aware the selling practice he desires is more expensive than alternative selling practices, and he will know that the retail price will have to be high enough to cover the costs a distributor incurs in following that practice. A problem will arise if some of his distributors adhere to the expensive distribution mode and others save costs by refusing to do so." These "uncooperative" distributors, says Mr. Baxter, are "free riders."

Premise 5: Rebuttal

Mr. Baxter posits that there may be no efficient alternatives to price fixing that are available to a manufacturer to ensure the proper marketing of his goods and that resale price fixing is the most efficient method of policing desired conduct. That premise is not accurate for at least two reasons: (1) the manufacturer does have nonprice alternatives and (2) a high price is no guaranty that services will in fact be performed.

To begin with, a manufacturer ordinarily can, by contract, insist that its retailers promote the good, can insist that its retailers provide service and warranty protection, and can insist that goods not be resold or transshipped to dealers that refuse to do these things. And, as incentive to provide these services to consumers, a manufacturer can, in most instances, give a retailer exclusive accounts or an exclusive territory. Under present law, however, what a manufacturer cannot do is very limited—but is very important to consumers—a manufacturer cannot fix prices.

These contract provisions will do more to ensure proper marketing efforts than will a price restraint. The simple availability of higher profits to a retailer does not guaranty good retail performance—to the contrary, it is an artificial incentive to be inefficient. A contract provision demanding quality performance in sales efforts better guaranties good performance than does a price fix. Indeed, an unprofessional retailer may keep high profits bestowed on him by resale price fixing and refuse to give service—in which case, the consumer is a double loser. In 1975, Congress recognized that price is not an acceptable method of dealing with the "free rider." The Senate Report noted: [45]

"[T]he manufacturer could solve this problem [of adequate service] by placing a clause in the distributorship contract requiring the retailer to maintain adequate service. Moreover, the manufacturer has the right to select distributors who are likely to emphasize service."

Baxter conclusion: Resale price fixing may be justified because of the "free rider"

"[I]f some distributors are incurring costs by following the agreed sales procedure and are selling at a higher price which cover [sic] those costs, while other distributors are not doing so and sell at lower retail prices, then the free rider phenomenon will appear. A substantial number of customers will go to the higher price outlet, will consume the time of sales personnel there to obtain the appropriate counseling, but will then leave without buying and purchase from a low-cost outlet instead." A fixed price, concludes Baxter, compensates the high-cost outlet.

Rebuttal conclusion: Baxter is wrong

It follows that, if Mr. Baxter's premises are not wholly accurate, neither is his conclusion. The free rider phenomenon has no basis in fact and, even if the problem does exist, it can be redressed in a far less costly fashion. Mr. Baxter has advanced no new thinking on the subject; all of his arguments have been thoroughly rejected in the past by Congress and the courts. Resale price fixing, in short, is not necessary to curb the "free rider." Price fixing is the problem, not the cure.

WHO MAKES THE LAW?

An equally pressing problem raised by the Administration's price fixing proposals is the usurpation of lawmaking powers by the Administration. Professor Milton Handler, a respected antitrust scholar for over half a century, recently addressed this "separation of powers" problem in discussing reform of the nation's merger policies, and particularly the Administration's revisions to its own merger enforcement policies: [46]

"The Department of Justice's new merger guidelines call into question the continued vitality of . . . Supreme Court precedent . . . [citing 10 Supreme Court merger cases]. Since none of those cases has been overruled, each remains the law of the land in its respective area. By disregarding those precedents, the Department of Justice would be breaching the duty of the Executive Branch faithfully to execute the laws of the United States. And by failing to carry out those precedents, the Department, as the principal enforcer of the antitrust laws, threatens in effect to overrule those Supreme Court cases. Since under our constitutional system only Congress or the Supreme Court may overrule Supreme Court precedent, the Department may thus be acting in derogation of the constitutional separation of powers . . . . Under our constitutional system, clarification of our laws can come from either the Legislative or Judicial Branch . . . . I would hope that, faithful to our democratic and constitutional traditions, the Department will institute litigation affording the courts an opportunity of correcting their past errors. . . ."

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[45] S. Rep. No. 94-466, 94th Cong., 1st Sess. 3 (1975).

[46] Handler, "Reforming Antitrust Laws," 82 Col. L. Rev. 1287, 1317-1318 (1982).

The public has been rightfully concerned with this separation of powers issue. For example, the American Retail Federation has urged the Antitrust Division to pursue the proper avenues for changing the law: [47]

"On behalf of its 50 state retail associations and 31 national retail associations, representing over one million retail establishments, the Federation urges that Justice Department and FTC officials confine their activities to a case-by-case judicial enforcement or a legislative proposal to Congress on this sensitive issue, and to make it clear in their statement that unless or until the courts or Congress change the law, resale price maintenance remains a per se antitrust violation."

Recently, Mr. Baxter has seemed more sensitive to the charge that he has usurped the law. His intervention in the Supreme Court in the *Monsanto* case and his announcement that he is considering proposing a statute to Congress to amend the per se rule are indications that he is aware of which institutions should make the law. Nonetheless, his concurrent refusal to prosecute the laws prohibiting price fixing is not simply a matter of prosecutional discretion. Mr. Baxter has imposed his views of the law on our economic and legal systems and has abdicated his enforcement responsibilities.

CONCLUSION

NMRI submits this briefing paper on resale price fixing so that all voters, consumers, businesses, the media, and elected officials will know what is at stake: will supply side antitrust philosophies supplant the established antitrust laws, or will resale price fixing continue to be illegal?

The answer, we submit, should be beyond question: resale price fixing must remain illegal per se. Resale price fixing causes grave economic injury and is not necessary to accomplish any valid purpose.

STATEMENT OF DR. STEVEN C. WHITE, PH. D., THE AMERICAN SPEECH-LANGUAGE-HEARING ASSOCIATION

The American Speech-Language-Hearing Association represents a membership of over 37,000 speech-language pathologists and audiologists. Our members provide services in hospitals, private practice, rehabilitation centers, skilled nursing facilities, university speech and hearing clinics, home health agencies, health departments, and community speech and hearing clinics. They provide both evaluative and restorative services to those suspected of having communicative handicaps and those who suffer from speech, language, and hearing disorders.

Because of the nature of our practice and the nature of service delivery in a variety of provider settings, ASHA adamantly supports a free and open marketplace in the health industry and, therefore, is supportive of the Federal Trade Commission's involvement in maintaining competition among health providers in the United States.

Those who oppose the FTC's incursions in the health marketplace postulate that the Commission has no place in overseeing quality of care issues. We agree with that premise but find no examples where the FTC has investigated areas such as credentialing, education, or professional practices. Since the 96th Congress maintained the FTC's authority in the health marketplace, two impressive rules have been produced by the FTC. These have received appropriate publicity for in one case the Michigan State Medical Society was prohibited from affecting agreements on behalf of its member physicians and the other rule required the Indiana Federation of Dentists to cease in recommending to its members to act against insurers who requested dental X-rays to review diagnoses and treatments. These two cases exemplify the merits of the work of the FTC in maintaining an open marketplace and allowing health insurers to keep costs under check. In no way did these rules intrude into quality of care.

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[47] Letter from William Kay Daines, Executive Vice President, American Retail Federation, to the Hon. William French Smith, Attorney General, July 27, 1982.

Moreover, Chairman James C. Miller III has written that the Commission supports self-regulation in the professions. He stated:

"For one thing, the law simply won't let us prohibit the sorts of socially responsible and valuable self-regulation that are prevalent in the medical, dental, legal and other professional fields.

"FTC law enforcement does not prevent progessional associations from participating in peer review of the fees or quality of care provided by professionals.

"FTC law enforcement does not prevent professional associations from speaking out on issues of public importance concerning the professions.

"FTC law enforcement does not prevent professional associations from participating in the accreditation of medical or dental schools or hospitals.

"FTC law enforcement does not prevent professional associations from certifying their members as trained and qualified for particular areas of professional specialization.

"FTC law enforcement does not prevent professional associations from disciplining or expelling members who are incompetent, or who engage in false or deceptive advertising or other dishonest behaviors.

"FTC law enforcement does not bar professional groups from active participation in hospital decisions on the qualifications of applicants for hospital staff privileges."

"Many forms of self-regulation are useful and desirable activities that can, in fact, promote competition and serve the public interest. But mere invocation of the magic words "self-regulation" will not and should not protect plainly illegal and abusive acts. (Government Executive, Nov./Dec. 1982.)

ASHA's particular concern relates to audiologists and speech-language pathologists continuing their profession unencumbered by unwarranted physician intrusion. We do not want to see the more powerful professions obtain the ability to create unnecessary controls over other health professionals using the guise of "in the public welfare" when, in actuality, it is the welfare of the more prominent profession that is at stake. We have had members report instances of physician panels stating that the director of a hospital speech and hearing clinic must be a physician for no reason other than that a physician should be the administrative head of a department. This type of action would serve the public in no way other than to add another cost on a hospital department's budget. In actuality, the patient would already have an attending physician and the speech-language pathologist and audiologist in charge of the department would have all the necessary credentials for delivering quality services in the hospital. There is no justification for such physician requirements and, fortunately, to date these have not been accepted by such national accrediting bodies as the Joint Commission on Accreditation of Hospitals. Additionally, it is well known that speech-language pathologists and audiologists have the highest level of training for dealing with these types of patients.

The FTC is also in the final stages of promulgating a rule on hearing aids. Naturally, the audiology members of our Association are interested in this rule. In essence, the FTC is considering implementing a regulation which would permit a purchaser of a hearing aid a mandatory 30-day trial period. We agree with the staff of the FTC, especially in light of their most thorough investigation which took place in the middle 1970s. The hearing-impaired users of hearing aids are sometimes not in a position to determine the desirability of hearing aid wear and the proposed rule would assist those hearing-impaired consumers with their judgments. If the FTC does promulgate this rule, there should be no barriers put in place by any kinds of limitations mandated during the reauthorization of the Commission. For example, if a state has a less protective rule or wants total exemption from the rule, the FTC's rule should not be eliminated for those states because of new limitations developed as a compromise during the current debate.

ASHA supports the work of the Federal Trade Commission and recommends that it be permitted to continue its work unencumbered by any provisions which will limit its capabilities to protect competition. We oppose legislation which would totally prohibit the FTC's authority in review of state-regulated professionals or their membership associations. For example, there should be no limitation of FTC jurisdiction over professional self-regulation concerning reasonableness of charges. Additionally, we suspect that language that exempts the professions in areas pertaining to the place and manner of practice would be used to camouflage anti-competitive practice.

STATEMENT OF NATIONAL ASSOCIATION OF OPTOMETRISTS AND OPTICIANS, INC.

The National Association of Optometrists and Opticians, Inc. ("NAOO") is an organization composed of optometrists and opticians, duly licensed or qualified to do business, who practice in nearly 40 states. These optometrists and opticians practice what is termed as commercial optometry; however, their qualifications and licensing procedures are identical to the so called non-commercial optometrists and opticians. Our members can be recognized because they do business in the various optical chains or optical departments located in the various states. Our professionals have vast experience in the eye care field and provide quality services and products to our patients and consumers.

NAOO opposes any blanket exemption for any segment of our society—particularly licensed professionals. The Federal Trade Commission ("FTC") should be allowed to retain jurisdiction over business and commercial practices regardless of the profession. We do believe that the states and the self-regulating bodies which liecense and qualify professionals do have the primary jurisdiction to establish professional requirements, licensing procedures and examination requirements. Business and commercial practices, however, are most properly within the scrutiny of the FTC. It is not difficult to disguise what is really a restraint on a business practice as a "professional" standard.

Our professionals have been subjected, in the past, to such restraints. We set forth to the committee the following hypothetical:

"A state enacts a statute regulating eye care which contemplates commercial optometrists. This statute, which refers to duly licensed optometrists and stores where glasses are sold owned by professionals, firms or corporations, is repealed. A statute regualting advertising for these professionals is amended and makes reference only to licensed persons with no reference to firms or corporations. Based upon this change in statutes, the State Board of Optometry which is composed entirely of noncommercial optometrists seeks to delicense the commercial optometrists in the state who do business for an optical company. Furthermore, the Board of Optometry seeks to remove the optical company from doing business and providing eye care within the state."

This hypothetical was an actual case which was heard by the United States Supreme Court. *Gibson* v. *Berryhill,* 93 S. Ct. 1689 (1973). In this case the Supreme Court affirmed a lower court's ruling against the State Board of Optometry because they were acting as judge and prosecutor and had a personal interest in the outcome. The court said that the members of the Board had a potential pecuniary bias and, therefore, personal interests invalidated their actions. If the commercial optometrists were delicensed, the noncommercial optometrists would benefit financially. The Court equated the license of the already practicing professionals, the commercial optometrists, as a property right and, therefore, protected under the constitution. Due process of law was found lacking in this case. The notion that peers with a financial bias on the outcome should act as both judge and prosecutor on the business practices of other duly licensed professionals was found to be unfair and a sham. NAOO does believe that a state legislature can affirmatively develop and enact policy; however, all too often state-licensed professionals are self-regulated and exceed delegated authority. The legislatures delegate blanket authority to these boards to develop licensing procedures and ethical standards which, without further supervision, spill over into and restrict business and commerical practices.

Since 1973 there have been other examples of cleverly disguised restraints on commercial practices which were proposed under the rubric of "ethical standards" or "professional qualifications". Presently, in one state a sales tax is proposed on goods dispensed by opticians, but optometrists, selling the same goods, would be exempted from this sales tax. In another state, the proposal is to prohibit duly licensed optometrists from signing leases for office space from corporations; however, these same professionals could lease from other professionals. Presumably, the fact that a licensed optometrist has a corporate lessor, instead of another optometrist, adversely affects the quality of care the lessee optometrist can provide. These are merely other examples of actions which are restrictive to normal business practices but are offered as necessary to maintain quality and professionalism.

The last Congress dealt with this exemption issue. A blanket exemption was proposed and ultimately rejected. It is interesting that in both the House and Senate reasonable compromises were offered. These compromises included specific exemption language for states and licensing authorities in order that the states or the regulatory bodies charged with setting standards could insure their antonomy with regard to educational requirements, examination requirements, and licensing procedures. Only business and commercial practices were retained within FTC jurisdiction. NAOO believes that these compromises struck a very sound and reasonable balance between rights of the individual states to regulate their professionals and the rights of the American consumer to be free from egregious anticompetitive acts. It is also interesting to note that these compromises were rejected by the same special interest groups who advocate the blanket exemption as necessary for preserving professional quality.

We ask the committee to keep in mind that in the eye care field commercial optometrists and opticians are licensed or qualified to do business in the same identical manner as their non-commercial counterparts; the only difference between the two groups is the price to the consumer. As independent studies repeatedly have shown, there is absolutely no difference in the quality given the consumer. One should also keep in mind that in the eye care field there is both a medical reason for seeking quality eye care and there are often cosmetic considerations for choosing the various forms of eye care—such as eyeglasses, different frames and, where medically practicable, choosing contact lenses over eyeglasses.

The issue really before this committee and the Congress is whether certain special interest groups, licensed professionals, should be totally exempt from normal trade laws to which all other Americans must adhere. As state licensed professionals, NAOO members can find no justification for this special exemption. In fact we believe that ultimately, should the exemption be passed, professionals will suffer and the American consumer will most definitely suffer.

Again, we do believe that a partial exemption, clarifying the right of the states and professionals to set their own standards in order to become duly licensed and maintain certain ethical standards which go to professionalism and quality and do not infringe upon business and commercial practices, would be reasonable and would define the existing role of the FTC. We are aware, however, that the FTC has never sought to override any state action in this area but merely to address action only to anti-competitive acts. Again, in the eye care field the FTC brought about a rule which required that once a patient is given and pays for an eye examination, the optometrist must then release the prescription to the patient so that eyewear can be shopped for in a comparison manner. We can find no fault with this provision as it only helps the consumer make an educated decision on what to buy and where to buy it.

NAOO understands that there are various proposals which are presently under consideration. We find most of them to be a full exemption disguised by artful language. Specifically, references to "permissible tasks and duties" or to "manner of practice" seem reasonable and harmless on the surface; however, these tasks and duties or manner of practice can cut to the heart of commercial practices. The FTC in the past has addressed commercial practices, or form of practice, as being a legitimate area of jurisdiction. We support the FTC in this area. NAOO would oppose any such references to permissible tasks or duties or manner of practice which did not explicitly retain a form of practice jurisdiction within the FTC's scrutiny. Furthermore, some proposals seek to inject quality of care factors into traditional antitrust analysis. Quality of care factors would provide no useful guidelines for the courts should actions be brought; therefore, quality of care factors are so vague that it would not be useful legislation and would probably cut deeply into form of practice jurisdiction as well. The FTC's antitrust authority must be preserved.

NAOO also believes very strongly that the Federal Trade Commission must retain real authority and jurisdiction to address future anti-competitive acts. Without real authority the FTC would be hamstrung and, therefore, would be prevented from achieving its objectives. The mere fact that the agency does have jurisdiction to pursue anti-competitive acts is normally sufficient to prevent violations. If a special interest group, regardless of how educated or how licensed, were exempted totally from what is presently a well-established system of careful checks and balances, the American public would suffer grievous harm.

Several states have no trade laws and the FTC really provides a function and expertise totally unique. If it were removed from this jurisdiction, then the states would be forced to duplicate, without really the ability or resources to do so, the expertise and experience found within the Federal Trade Commission. State licensed professionals would then become their own judges and prosecutors without any review over a full range of matters—not limited to professional qualifications. Normally state legislatures ignore the actions of the self-regulating bodies, because these bodies are created to provide the expertise and not to establish trade regulations. If you refer back to the example of optometrists being restricted from signing leases with corporations, such restrictions have no basis in professionalism but rather seek to eliminate very cost competitive optical chains from providing quality care to a segment of our society who require eye care but at competitive prices. If the FTC is removed from this jurisdiction we would turn back the clock and most assuredly the price of eye care will rise dramatically. Health care costs are rising because of too much self-regulation and protectionism. FTC actions in this area only seek lower costs by removing anti-competitive restraints.

In summary, NAOO does not believe that there is any necessity to enact legislation to curtail the jurisdiction of the FTC. The Congress, the courts and the states themselves provide a reasonable and effective check and balance on the FTC should it erroneously interfere with traditional state functions. In the past we are aware of no such interference by this agency. Any reasonable partial exemption, however, should address itself to the state functions of educational standards, licensing requirements and examination standards. It is only when standards or tasks and duties have restricted business and commercial practices that the FTC has become involved. Form of practice is an area in which the agency correctly belongs.

STATEMENT OF THE AMERICAN CHIROPRACTIC ASSOCIATION

It is a pleasure to again submit testimony before this committee as it evaluates the problem of reauthorizing the Federal Trade Commission.

During the last session of Congress there was a lot of rhetoric regarding the issue of the FTC's authority over professional groups. The Energy and Commerce Subcommittee on Commerce, Transportation and Tourism considered these issues and returned a "clean" reauthorization bill to the full U.S. House Energy and Commerce Committee. The full committee reported out a bill which retained the full authority of the Federal Trade Commission. On the floor of the U.S. House of Representatives the Broyhill amendment was offered as a compromise measure. It was supported in that fashion. In the spirit of compromise the ACA accepted the measure as a diminished FTC reauthorization. It was an amendment that no one fully liked. The Coalition to Save the FTC's Jurisdiction Over the Professions endorsed the move. In short the Broyhill amendment was not the ideal choice of either side. Perhaps that was its appeal. The House of Representatives was almost evenly split; the vote was 208-195 against the Broyhill amendment. The results accurately reflected a house divided. The Luken-Lee amendment (exempting professionals) subsequently passed 245-155.

Following the House's action, as you know, the U.S. Senate on the floor of that body rejected the AMA supported motion that would have been the indication of the Senate's feelings. Fifty-nine Senators voted to table the McClure amendment on the floor. The Senate bill that was brought to the Senate floor included the Rudman amendment which took cognizance of the action of the state legislatures when they specifically legislated the professions. The Federal Trade Commission would retain its authority over the professions. During the House-Senate conference the American Dental Association and the American Optometric Association split with the American Medical Association and supported the Rudman amendment. The AMA supported the House version which did not enunciate the FTC's authority.

It would be inaccurate to describe the arduous process of hearings that took place during the last session of the 97th Congress as fruitless. The hearings and the subsequent activities which occurred served to focus on the multiple differences that the public and some private entities felt about the statutory authority that has been given to the Federal Trade Commission.

Indeed the scope of the FTC's jurisdiction is at the center of the controversy. For any group to put forth the supposition that the professions were united behind any single phrase or statutory language is sheer folly. In this testimony the American Chiropractic Association will focus on the area with which it is familiar and will leave the rest of the issues to others with more expertise to share their thoughts and experiences with the committee. During the last session of Congress the question of unanimity within the professions was said to be complete. Supposedly all were in favor of limiting the FTC's authority over the professions. Nothing could have been further from the truth. It was not long before an organized group emerged. The Coalition to Save the FTC's Jurisdiction Over the Professions was formed representing over 30 groups—health-care providers, labor groups, and business. This umbrella group represented millions!

Before one gets mired down in all the rhetoric that accompanies any fundamental reexamination of the charter of an important agency one must remember the historical rationale for its birth. The Federal Trade Commission was conceived as part of the answer of serving the public need. The American consumer and all who provide to that consumer need to operate with some rules and boundaries. The businesses and professions, we feel, have and must operate within certain boundaries as well. Society has to operate within rules and laws to function effectively. In this dialogue let us not forget the public good is the ultimate goal. It is a contradiction in terms to support the supposition that any one single private group, be it a private business or a profession, is the repository of the answer.

Independent bodies, be it the judiciary or an independent agency such as the FTC, can sometimes effectively serve the public as an independent arbiter. The American Chiropractic Association supports the role of the FTC's jurisdiction over the professions. We oppose an exemption of the professions. There is no argument that has been enunciated that would bring us to feel that the FTC does not have a role to fill. The professions need it, the public demands it, and the Congress should endorse the concept that there is a legitimate public need for the FTC to be able to investigate antitrust, boycott, and anti-consumer activities. Why should the professions be exempt from the rules which govern all businesses in this country? The answer is that they should not be.

A STATE ROLE

We have all heard the story about the state being the proper authority to dictate and enunciate the laws and rules governing the professions. We have well-founded constitutional laws relating to states rights. Is that the real question before this committee? We think not. In all the cases brought before the courts relating to the authority of the FTC, a federal agency, to invoke its authority there was not one case that succeeded in persuading the courts that the FTC's authority was limited vis-a-vis the professions. Let's lay that false argument to rest. It does no more good than clouding a difficult issue. Let's take a look at the critical issues that are before this committee, the bedrock decisions that must be addressed by this body.

We are not saying that the state does not have a proper role to fill. It certainly does have a role, and it is an important one. That is not to say that the Congress and the federal laws that it passes do not have a proper role in our society. The Congress in its wisdom has passed some exceedingly intelligent legislation which has outlawed certain types of anti-competitive and boycott activities that have traditionally appeared in the marketplace. Whether the professions choose to acknowledge the fact or not, they collectively and individually represent a substantial portion of marketplace activity. Billions of dollars are spent each year for health care. The federal government has been shouldering an increasingly large part of the bill. It has been shouldering this burden as a public policy. Is it not right that a federal agency should have a legitimate role in overseeing the activities that occur in this health-care market? We think it is extremely appropriate. Antitrust and anti-consumer policies that are perpetrated on the public by the professions should be reviewed.

The most difficult idea for us to fathom is the one that has been espoused by the AMA. On the one hand they say the FTC should have no responsibility over the professions. They say there is appropriate authority in each state to regulate the professions. Then on the other hand the notion is put forth that the U.S. Department of Justice is the appropriate body to handle antitrust matters. Nowhere in all the volumes of the hearings of the last Congress has the Justice Department come forth and said that they would fill the void if the FTC's jurisdiction was stripped over the professions. No commitment of new lawyers or new dollars to fund the necessary investigations were promised by that department. As a matter of fact, we have not seen anyone come forth with the suggestion that, or the amendment, that the Justice Department be given the money as well as the statutory authority to oversee the consumer protector role of the FTC. Nor have we seen any group or body endorse that concept. The FTC's mandate is different from Justice's mandate in any case.

To get an overview of the entire picture one should also hear of the other legislative initiatives of the AMA. They point with pride to the jurisdiction of the Justice Department and of state agencies but nowhere do they also advise this deliberative body of the other legislative priorities of the AMA. They have undertaken initiatives to gut the antitrust laws on the federal as well as the state governments. Lest the fact be overlooked not all states even have antitrust laws. The AMA says that the states should be the repository of oversight over the professions. What of the states where no such laws exist? Are the federal dollars that come from all the taxpayers supposed to be thrown away? Under the arguments espoused by the AMA there would be a sorry lack of oversight.

ANTICOMPETITIVE HISTORY

Anti-competitive activities in the health services market have had a long history. Since 1943, the Supreme Court of the United States has held that, although it was a professional organization, the AMA was liable under antitrust laws for unreasonably restraining the business practices of a potential competitor. [AMA v. U.S., 317 U.S. 519 (1943).] And since then the Federal Trade Commission's antitrust activities have clearly demonstrated a continuing pattern of organized medical efforts to throttle competition in the health care industry. Such FTC antitrust actions have been in the public interest, and were necessary to eliminate restraints on inter- and intra-professional competition.

Our own experience has shown that state regulation of the health professions has been woefully ineffective in preventing illegal and improper anti-competitive or monopolistic practices by competing professional groups which have openly and explicitly sought to eliminate chiropractic as a health care competitor. A current example is occurring in South Carolina today as the state medical society has made an all out assault against the chiropractic profession, going so far as to name their political action committee the SOC–PAC, Stamp Out Chiropractic-PAC. We are not addressing the First Amendment issue here just the competition issue.

SUMMARY

Price fixing, boycotts, conspiracies in restraint of trade and the like do not recognize state boundaries. Consumers of professional services must continue to be accorded the same protection from monopolistic and anti-competitive practices as are those consumers in other sectors in the economy.

The FTC is the only federal agency that has a specific mandate to protect health care consumers in this fashion. The public interest in a truly competitive health services market demands that the FTC continue to exercise its current legal authority to protect the public in its dealings with the health professions. Experience has amply demonstrated that state regulation of the health professions and self regulation by the professions themselves do not protect either the public or the professions from the anti-competitive and monopolisitic practices which prevail in today's marketing of health services. The FTC's authority speaks to the issue of the business aspects of professional practice. Continuance of the FTC's jurisdiction is a minimum necessity for the protection of health care consumers in the United States from monopolistic and anti-competitive practices.

We supported the FTC's reauthorization with jurisdiction over the professions. In a compromise measure Broyhill type language is acceptable. We support the legitimate state role of the licensing of professionals to include the training and educational standards as appropriate state activity. The FTC's jurisdiction is designed to oversee the business practices of the professions.

STATEMENT OF THE AMERICAN DENTAL HYGIENISTS' ASSOCIATION

The American Dental Hygienists' Association, on behalf of its 30,000 members, wishes to make its views known to the Senate Commerce, Science, and Transportation Committee regarding legislative proposals to reauthorize the Federal Trade Commission. The Association urges the Committee to oppose amendments which are intended to exempt state regulated professions from the Commission's oversight authority.

Chairman Packwood and other members of the Committee are aware of the fact that the Association is an active member of the Coalition to Save the Jurisdiction of the Federal Trade Commission Over the Professions, a broad based group representing labor unions, retail merchants, consumer organizations, retired persons and health professionals' organizations. This Coalition continues with its efforts to oppose attempts to limit or restrict the Federal Trade Commission's authority with respect to the antitrust, commercial and trade practices of health and other professions.

The Association has reviewed testimony of FTC Chairman James C. Miller, and four Commissioners presented to the House Subcommittee Commerce, Transportation and Tourism on March 8, 1983. We note that while the members of this Commission are not always in agreement on matters which come before it, they were unanimous in urging that special interests—namely, the professions—not be exempt from the Commission's authority to enforce the laws that foster competition in every sector of the economy. The Association also supports this view.

The Association's statement to the House Subcommittee of May, 1982, included the following comments, which are appropriate to bring to the attention of the Senate Committee:

". . . the professions, and in particular the health professions, should not be immune from FTC law enforcement in the realm of the free market place where there may be artificial barriers or restrictions that could block free consumer choice in the purchases of health care services.

"The elements of costs and access to health care services from the consumer's point of view were the key reasons for the FTC's 1977 investigation of dental hygiene licensure. In the Commission's view which the Association shares, the dental hygienists' primary function is the delivery of preventive health services. In this role, the dental hygienist is one of the important keys in the dental delivery system for improving dental care. The Commission and the Association recognize that there is still a compelling need for the dental profession to improve access to dental care among special populations, such as the elderly, the handicapped, the poor, children and residents of rural areas."

The Association carefully monitored proceedings in the 97th Congress during which amendments were offered in both the House and Senate to limit the authority of the Federal Trade Commission with respect to professions already regulated under state law. The Association, and the FTC Coalition to which it belongs, accepted the compromise amendment offered by Congressman Broyhill in the last Congress. Neither the Association, nor the FTC Coalition has, at this time, approved Senator Rudman's revised compromise proposal.

The Association remains opposed to amendments which would exempt state regulated professions from the oversight and rule-making auhority Commission for the following reasons:

(1) Commission jurisdiction over state-licensed professionals is critical to the maintenance of free and open competition in the health care industry;

(2) With respect to trade and business practices, no state-regulated profession should be exempt from or above the laws that apply to all other sectors of the business community;

(3) Commission authority to police unfair business or commercial practices of state-regulated health professions should remain intact to promote competition among health providers;

(4) State regulatory boards, without Commission oversight authority, may be tempted to shield anti-competitive commercial activity of state-regulated professions under the guise of legitimate regulatory activity; and

(5) The health care industry is a major part of the nation's economy and as such, merits the scrutiny of the Federal Trade Commission in the public interest.

In its 1982 record statement to the House Subcommittee and currently, the Association wishes to emphasize that the primary function of the dental hygienist in the dental care delivery system is to provide quality preventive oral health care to all consumers. However, the Association recognizes that the dental regulatory agencies—namely, state boards of dental examiners—either by law or administrative rules, tend to limit access to preventive dental care which hygienists by education and licensure credentials are qualified to deliver. The Association believes that limited access to a dental hygienist's services, generally regulated in the dental practice acts by definition of dentist's supervision, tends to serve the interest of the dental profession more than it serves the interest of the public and the consumer of dental health care services. For this reason, the Association believes that the business and trade practices of the dental profession can be enhanced by preserving and continuing the monitoring and scrutiny of the Federal Trade Commission regarding such practices.

Currently, there is mounting evidence within the dental profession that officials now recognize that with less restrictive supervision regulations, dental hygienists can in fact enhance the profession's ability to provide access to preventive oral health care. The Association is gratified to observe this internal development within the profession and openly encourages change among the dental regulatory agencies which, increasingly, include dental hygienist representation.

Nonetheless, the Association believes that the Federal Trade Commission's investigation into certain aspects of dental practice, licensure and supervision of dental hygienist's services has been the sine qua non to bring about the change in the profession's point of view. In our view, the Commission's investigation of the dental practice acts and dental hygiene licensure was in the public's interest and has encouraged a more benevolent assessment of the value of dental hygienist's services and contributions to dental care than otherwise might have prevailed. For these reasons, the Association continues to oppose exemption of state-regulated professions from the purview of the Commission.

In closing this statement, we sense that a consensus has already developed in the Congress, among the professions and consumers, that special interest groups, whether they represent health professions or other licensed professions, should not receive or be entitled to exemption from the consumer protection aspects of the Commission's authority. No special interest group should be regarded as being "above the law", if it engages in trade and commerce in the open market place.

We urge the Senate Commerce, Science, and Transportation Committee to preserve the Commission's authority to serve as watch-dog and protector of the public's and consumer's interest. The Association recognizes that the Committee, and we hope the entire Congress, is now ready to get the Commission's reauthorization action behind it.

THE AMERICAN ASSOCIATION OF NEUROLOGICAL SURGEONS

The American Association of Neurological Surgeons, representing the neurological surgeons of this country, appreciate the opportunity to make a statement regarding the practice of medicine and its relationship to antitrust and Federal Trade Commission matters.

It is my intention to be brief and to the point as to our concerns and recommendations for an equitable resolution of the outstanding differences between the professions and the questions of antitrust considerations.

For our organization, the issue of greatest concern has to do with the chilling effect antitrust considerations have had or may have in the future upon professional activities which we feel are in the public interest. It is understood that there is a challenge in defining the boundary between professional activities which are in the public interest and those which might seem self-serving and in restraint of trade.

In the past seventy years provision of medical care in this country has grown from a cottage or essentially domestic enterprise to a vast industry. At the time Congress created the Sherman and Clayton antitrust acts it seems likely that due to the low profile of the commerce of medicine not a great deal of thought had been given by Congress to the application of these acts to regulate medical care matters.

We have followed the colloquy in both the House and Senate in the previous Congress on this issue. We are aware that the debates were heated and the proposed solutions multiple. The debate in organized neurological surgery was no less intense. We considered consumer interests, the legal aspects of the FTC's statutory jurisdiction, the relationship of the antitrust laws to the profession, State prerogatives, the complexities of our nation's health system, the distinction between commerce and professional activities in the public interest and indeed our fears based upon a seemingly presumptive FTC intervention. Our debate, I believe, was always within the context of our responsibilities to society and to our profession.

The culmination of these internal dialogues is my presence here today to respecfully present a number of recommendations. We suggest that the following two points should no longer be at issue.

1. The medical profession should *not* be totally exempted from the jurisdiction of the FTC. In our view there are areas of our health delivery system that are an intimate part of our nations economic structure. To contend otherwise would suggest that the medical profession and the health system should be set aside as a privileged class outside our antitrust laws.

2. We believe that the Commission has judicial and legislative jurisdiction to monitor and, when necessary, to act to prevent unfair competitive practices on the part of any segment of our health care system, including neurosurgery and the medical profession in general.

At issue for us is the question of clarifying the jurisdiction of the Commission over several voluntary self-regulation practices of our profession. At the outset I want to make it clear that we do not recommend exemption from surveillance but only, to the extent possible, clear guidelines so that we can go about what we preceive to be our necessary professional responsibilities to assure the public the highest quality of care and professional competency.

Physicians who have been trained basically as individual problem-solvers in behalf of their patients are at a disadvantage in understanding antitrust matters. Their training is inadequate as a rule to do so. Clearly, however, physicians can be expected to understand that the products used for medical care and the fees involved for their services are not inherently different from those for the manufacture and sale of other goods or the provision for such services as legal counsel, advertising efforts, and others. In the sense that medical economics has become such a major segment of our national economy it is clear that medical care is a part of our system of commerce and should be no more exempt from scrutiny than any other commercial endeavor. However, as stated previously, the boundaries between certain professional activities and commercial endeavors can be indistinct.

There are a number of professional activities in which professional people such as physicians, dentists, attorneys, engineers, and architects engage in the public interest. Among these are involvement in professional education standards, licensure, credentialing as to competency in special fields, as well as a number of other self-regulatory practices. Some of these activities are mandated by state law or are state-regulated and it would seem these deserve special consideration in antitrust matters.

Perhaps it will help to review physician involvement in these and other types of professional activities, some of which are involved in state law, others which cross state lines or are purely voluntary.

The long and arduous training of physicians is will known. It leads to a broad understanding of the form and function of the human body and those disease processes which afflict it. The license granted by each of the states gives physicians broad latitude in the management of the afflicted, as opposed to certain other health care professionals who by virture of less comprehensive training are granted limited licenses to care for the afflicted.

Physicians have long considered themselves responsible for certain activities for the benefit of the public.

During the first two decades of this century with the shift of medical education from a proprietary form to schools of public charter, American physicians have played a major role in the development of physician education and standards of achievement. Physicians are involved in state licensure procedures.

Beyond licensure physicians have considered themselves responsible for a still higher standard of competency. As specialization developed in the second and third decade of this century a voluntary certification process developed, creating the medical specialty boards. There are now twenty-three of these who set standards for education and performance in training, create and administer challenge examinations and certify physicians as to basic qualifications in various specialties. F.T.C. activity has recently produced a chilling effect upon such efforts though such activity by the F.T.C. has, for the moment, ceased. An example would be the subpoenas issued to several specialty boards for voluminous records, action which required expenditures of relatively large sums of money by these voluntary organizations. We firmly support the voluntary effort in specialty certification since it is in the public interest and believe this effort deserves special consideration in antitrust matters.

Similarly, a voluntary effort exists in the accreditation process for institutions providing care for the afflicted. The early impetus for the study of care provided by physicians and hospitals came from the American College of Surgeons in the second and third decades of this century. From this there emerged the modern voluntary Joint Commission on Accreditation of Hospitals which is sponsored by the American Medical Association, American Dental Association, American College of Surgeons, American College of Physicians, and the American Hospital Association. This group creates standards for and surveillance of hospital facilities and resources and the organization and performance of the professional staffs. This practice has become a matter of antitrust consideration through efforts of limited licensed individuals to achieve a broader range of hospital privileges and a stronger voice in organized professional staff affairs. Hospitals have been held by the courts to be responsible for the quality of care rendered to those admitted therein for care and therefore have a valid concern about privileges to practice and the quality of care within their walls.

We believe that physicians should continue to be responsible for those professional activities of patient care which occur within hospitals. We further believe that the informed public would expect this. We believe there should be a clear relationship which places the responsibility for hospitalized patients in the hands of physicians who have been through current education, training and licensure processes. This in no way precludes the practice of limited licensed individuals in the hospital setting but assures that in case problems arise outside the competency of limited licensed persons, there is a well-defined, predetermined relationship with a more fully licensed practitioner. We have been told that such arrangements relegate limited licensed personnel to that of second class citizens and that, further, this may represent a restraint of trade. American physicians find themselves confused at such talk when they are held accountable by the public for the highest standard of care and have gone to great lengths to meet this responsibility. Indeed we must reiterate the chilling effect of the threat of antitrust activity against such efforts. We wish to further share with you our concern that antitrust activity is being used as a weapon to remove traditional distinctions which have existed between the medical profession and artisans or tradesmen. We hope that the distinction which arises through the profession's devotion to the activities enumerated here will be allowed to continue.

Mr. Chairman, we strongly recommend that to the extent possible the statutory language provide as much clarification as possible as to the intent of Congress with respect to these types of medical professional activities which concern education, licensure, specialty certification, association activities, peer review, matters of accreditation, and supervision of the quality of care given within institutions for the care of the ill. We further recommend that the F.T.C. be required to establish published guidelines or advisory opinions on its responsibilities and interpretation of Congressional mandates. This action would be very helpful to the profession.

Finally, we recommend a provision which will enable an association to make a claim for expenses incurred as a result of Commission investigation for which no cause is found.

STATEMENT OF ORRIN W. JOHNSON, PRESIDENT, STATE BAR OF TEXAS

My name if Orrin W. Johnson. I am an attorney practicing with an eight lawyer firm in the small city of Harlingen in the southernmost part of Texas near Brownsville, Texas. I am also the elected President of the State Bar of Texas. Ours is a unified or integrated Bar association and an agency of the Judicial Branch of the State, as are approximately 31 other State Bar associations within the United States. Our membership exceeds 40,000 lawyers and we are the second largest State Bar association in the Nation.

It is my privilege on behalf of the State Bar of Texas to comment on prospective legislation that would limit the regulatory power of the Federal Trade Commission by specifically excluding the legal profession, and more especially those bar associations which are agencies of the respective states, from the jurisdictional reach of the Federal Trade Commission. In doing so, I propose to avoid, insofar as I can, retreading the same ground covered by witnesses testifying on behalf of the State Bar of Texas at earlier hearings of this Subcommittee. I will therefore simply offer and make reference to, for historical purposes, the testimony of (then) Texas Attorney General and now Governor Mark White and Mr. Chrys Dougherty, Past President of the State Bar of Texas, given before this Subcommittee on July 15, 1981, and filed this week with your Chairman.

My purpose today is to briefly refresh the recollection of this Committee upon the role of integrated Bars, and more especially the State Bar of Texas, in regulating the legal profession. I will seek to do this in the light of the balance which has historically existed between state and federal governments under our system of balance of powers. The gist of what I have to tell you is that further efforts by the Federal Trade Commission to regulate the profession and practice of law in states like Texas is duplicitous of the responsibility, efforts and successes of the several State Supreme Courts. I refer particularly to those bar associations of states like Texas, in which integrated Bars which are administrative agencies of the Judicial arm of State government and which are subject to the regulatory power of the State Supreme Court.

My point is that attempts by the Federal Trade Commission to regulate the practice of law in states such as Texas will inevitably result in unnecessary frictions between that agency and our State Supreme Court. Questions will inevitably arise as to the powers of the Commission to preempt the regulatory powers of the Texas Supreme Court over the practice of law, which will force the State into a position of needing to defend itself against the FTC's unwarranted intrusion. By clarifying Congress' intent respecting FTC's power to regulate state agencies like the State Bar of Texas, Congress can, we hope, prevent an unnecessary future waste of time and tax monies in litigation aimed at settling priorities of federal regulatory power as against state regulatory power. Such a limitation as I propose will eliminate future uncertainty as to where the responsiblity lies, under our system of balance of powers, for the proper regulation of the practice of law in states like Texas.

In making these comments, let me say, preliminarily, that I do not profess to know much about the workings of such voluntary associations as the American Medical Association. Many problems that have allegedly existed with voluntary or private groups of doctors dentists, optometrists, chiropractors, undertakers and the like, are beyond the scope of my knowledge. However, I cannot conceptually equate such voluntary associations with a de facto State agency like the State Bar of Texas.

I do know something about the profession of law across the United States, and more especially those Bar associations which are unified and are administrative arms of the Judicial Branch of state governments. As you know, in states having unified or integrated Bars, all lawyers are required to be members in order to practice law within the jurisdiction. They are also required to pay Bar dues. In Texas, the payment is made to the Clerk of our Supreme Court.

There are some slight variances in the responsibilities assigned to these Bars, as between different states, and my knowledge, of course, is centered particularly around the role of my own Bar in relationship to the Supreme Court of Texas, which is its ultimate regulator.

As an agency of the State of Texas, the State Bar of Texas does not maintain paid lobbyists in Washington. The providing of financial support for partisan or political causes is beyond the scope of the statutory purposes granted to our State Bar, and we do not do that. We, of course, have no PAC or other entity which might enable us to collectively express ourselves in the political process through experienced and qualified professional persons. The State Bar of Texas must depend entirely upon unpracticed members of the Bar, such as myself, who volunteer to explain our position to the Congress. Nevertheless, we fell that our statements on behalf of the integrated Bar, although entirely valid, are drowned out by the clamor of competing voices arguing over issues which are unrelated to us. With respect to the present issue of whether or not the FTC should be given regulatory power over the learned professions, the distinction which we have drawn between regulation of a voluntary private association, such as the American Medical Association, and a State agency, such as ours, seems to us to have been forgotten or overlooked.

To briefly refresh your recollection concerning matters which have been more fully explained by earlier witnesses, the legal profession has historically and traditionally been regulated by the Judicial Branch of state government. In the case of the State Bar of Texas, the governing statute makes it plain that our integrated Bar is an arm of the Judicial Department of the state; that is, an agency of the State of Texas itself. You may recall that in the Act which creates our integrated Bar, Tex. Rev. Civ. Stat. Ann. art 320a-1 (Vernon's Supp. 1982), the Legislature of Texas has recognized that the State Bar of Texas is an administrative agency of the State and subject to the administrative control of the Supreme Court of Texas. The Act provides:

"The State Bar of Texas established under the laws of this state is continued as a public corporation and an administrative agency of the judicial department of government. It is designated as the State Bar. This legislation is in aid of the judicial department's powers under the Constitution to regulate the practice of law and not to the exclusion of those powers. The Supreme Court of Texas, on behalf of the judicial department, shall exercise administrative control over the State Bar under this Act."

This is simply an uncontroverted fact, recognized not only by the Legislature, but by the Courts in several opinions, see *Banales* v. *Jackson*, 601 S.W.2d 508 (Tex. Civ. App.—Beaumont 1980); aff'd 610 S.W.2d 732 (Tex. 1980) and, of course, by the Bar association itself in the recent adoption of its revised administrative rules, 46 Tex.B.J. 64 (Jan. 1983) (preamble). As a State agency, the State Bar of Texas is accountable to the Texas Supreme Court. It is burdened with the regulatory requirements imposed upon other State agencies in Texas and is subject to tax and other exemptions which are common to such agencies.

Different from voluntary associations such as those which seem to be the focus of attention of this Committee, many laws impose duties upon the State Bar of Texas which are not imposed upon private associations. Thus, for example, the State Bar of Texas, as a State agency, is subject to the Texas Sunset Act, Tex. Rev. Civ. Stat. Ann. art 5429k (Vernon's Supp. 1982). See, Tex. Rev. Civ. Stat. Ann. art. 328-1 Sec. 21 (Vernon's Supp. 1982). In 1979, our Bar underwent an exhaustive legislative overview covering every detail of our operations under the Texas Sunset Law, and we are scheduled, again, to undergo Sunset review in 1991.

As a State agency, the Bar is subject to the provisions of the Texas Open Records Act, which requires us to give access to the public of written information in our custody. Tex. Rev. Civ. Stat. Ann. art. 6252-17a (Vernon's Supp. 1982).

Because our Bar is a State agency, meetings of its Board and Executive Committee are subject to the 72 hour public notice provisions of the Texas Open Meetings Act, which also forbids us to hold meetings in which actions are taken if the meetings are closed to the public. Tex. Rev. Civ. Stat. Ann. art. 6252-17 (Vernon's Supp. 1982).

By law, the State Bar's budget must be published and presented annually at a public hearing in which the public may participate in the discussion of any item proposed to be included in the budget. Tex. Rev. Civ. Stat. Ann. art. 320a-1 Sec. 7 (Vernon's Supp. 1982). The State Bar Act also provides that the Supreme Court is the agency which gives final review and approval of the budget of the State Bar.

Like other State agencies, the State Auditor audits the financial transactions of the State Bar during each fiscal year. The Auditor's report is published annually in the Bar Journal. Tex. Rev. Civ. Stat. Ann. art. 320a-1 Sec. 7(b) (Vernon's Supp. 1982).

The regulatory power of the Texas Supreme Court over the State Bar is not a dormant power, but is, in fact, exercised whenever the law or the occasion demands. Thus, for example, on June 1, 1982, the Texas Supreme Court, after reviewing the Bar's proposed final budget, as presented to it, entered an order amending the budget in several respects. A liaison member of the Texas Supreme Court attends each monthly meeting of the Bar's Executive Committee and each regular or special meeting of its Board of Directors. Our present liaison member is the Honorable Charles W. Barrow. In his liaison capacity, he actively participates in such meetings and also reports upon matters involving the Court of which he feels these Boards should be informed.

As we have explained in earlier hearings, the membership of the Board of Directors of our State Bar is composed, in addition to the officers, of thirty attorney-members elected from Bar districts from different parts of the State, together with six non-lawyer public members. The public members are appointed by the Texas Supreme Court, three of them upon nominations received from the Governor.

Disciplinary matters are handled by grievance committees within the different Bar districts. Like the members of the Board of Directors, members of grievance committees are not compensated for their service. One-third of the total membership of each grievance committee is composed of non-lawyer members of the general public. Tex. Rev. Civ. Stat. Ann. art. 320a-1, Sec. 12(e) (Vernon's Supp. 1982). The review of the structure, function and effectiveness of the grievance committee is under a committee of nine members appointed by the Texas Supreme Court, one-third of whom are also public members. Tex. Rev. Civ. Stat. Ann. art. 320a-1, Sec. 14 (Vernon's Supp. 1982). The State Bar Act provides for approximately the same procedure in appointing a committee to oversee matters involving the unauthorized practice of law. Tex. Rev. Civ. Stat. Ann. art. 320a-1, Sec. 19(b) (Vernon's Supp. 1982).

The procedures and standards for admission to the State Bar are also controlled by the Texas Supreme Court. In general, the admission and testing of persons desiring to become lawyers in Texas are handled by a separate State agency appointed by the Supreme Court of Texas and known as the Texas Board of Law Examiners. Tex. Rev. Civ. Stat. Ann. art. 304-310 (Vernon's Supp. 1982).

Indeed, it would be difficult to conceive of persons or an agency more thoroughly subject to the regulatory powers of the State judiciary, and in particular the Texas Supreme Court, than are the lawyers of Texas and their State Bar.

For the sake of brevity, I will simply refer to the earlier testimony of Attorney General White and Past President Dougherty to explain the other details of the rather elaborate regulatory control maintained by the Supreme Court of Texas over Texas lawyers, their practice, and the State Bar of Texas.

In this context, then, I turn to the problems which we envision insofar as concerns unified Bar associations like our own if, under some broad "Mother Hubbard" jurisdictional expansion, the Federal Trade Commission should be determined to have overall regulatory authority over the so-called "learned professions", including unified Bars.

In 1981, we were concerned because of an attempt by the Federal Trade Commission to expand its jurisdiction by calling for an elaborate questionnaire from all of the State Bar associations in the United States. A majority of the Bar associations, including that of Texas, declined to respond upon jurisdictional grounds. Apparently, that threat from that regulatory thrust by the FTC has receded, inasmuch as the Commission does not seem to have pursued the matter further.

However, we observe that in the long run federal and other bureaucracies have not demonstrated a tendency to restrain themselves when it comes to expanding either their own regulatory powers or budgets. In fact, the tendency always appears to be the opposite. And, while we are presently in a period in which greater appreciation seems to be given to the burdens and waste imposed upon both public and private business by unnecessary and duplicitous regulation, not to mention the additional expenses which must be budgeted for such regulation by the federal government, we are by no means sure that this salutory attitude will always persist in the ebb and flow of political change in Washington. Down at our level in Texas, the absence of a clear demarcation between the regulatory powers of the FTC and those of the Supreme Court of Texas creates uncertainty, to say the least, not only for those in responsibility for our State Bar, but also for our individual members.

This kind of uncertainty for the legal profession, and especially integrated Bar associations, is unwarranted when caused by alleged anti-competitiveness engendered by private associations in other professions. We do not have, and have not been accused by anyone of, such problems as price-fixing, bans on advertising or State licensing regulations which unfairly restrict competition, so far as I know.

It is the worst kind of regulatory bootstrapping to sanction preemptive federal regulation over the law practice in Texas based upon alleged problems which have existed with a voluntary association of a different profession. Inevitably, a collision will arise . . . in our case, one between our Supreme Court of Texas, which is our regulatory body, and the FTC acting under its purported regulatory powers. The result will be costly, wasteful and needless litigation on the subject of federal preemption. Sanctioning such a collision does not serve the public interest. In fact, there is at least a strong possibility that, in the end result, the FTC may end up with no gain in its powers over integrated Bar associations due to a judicial determination that, under our system of balance of powers, its regulatory authority does not extend to state agencies like our Bar. Meantime, however, there will have been an expensive donnybrook with a great waste of dollars, both state and federal.

Let me point you to an example of what I am talking about:

The decisions by the United States Supreme Court in *Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977) and *In The Matter of R.M.J.*, 455 U.S. ——, 50 U.S.L.W. 4185 (1982), made it clear that, while so-called "commercial free speech" in lawyer advertising of "routine legal services" would be protected under the First Amendment, nevertheless, false, deceptive or misleading advertisement was subject to restraint by Bar associations and others. During the interim between and after the dates of these decisions, widespread uncertainty existed as to exactly what sort of standards might be prescribed for determining whether an attorney's advertising was false, deceptive or misleading. Certainly the minds of men could differ on the subject and the Supreme Court, while announcing a decision, had prescribed no standards.

In Texas, the problem was particularly acute, as advertisements blossomed in the telephone directories, newspapers, television and elsewhere, which might very well mislead an innocent member of the public, but which, on the other hand, an adroit legal mind could argue could be truthful. Moreover, if an apparent offense occurred, the grievance committees were faced with a most difficult problem of the burden of proof and standards to be applied in such cases. If they sought to enforce what appeared to them to be the law, they might be later faced with civil rights lawsuits with treble damages brought against them on the grounds that they had, somehow, offended someone's First Amendment freedom.

The result was chaos and, for a while, nothing was done.

Then, after a couple of false starts by referendum, the Supreme Court of Texas, acting under its inherent powers to regulate the practice of law, adopted detailed standards for lawyer advertising by its Order of July 21, 1982, 45 Tex.B.J. 1111 (Sept. 1982). In its Order, it defined (among other things) what will be regarded as a "material misrepresentation of fact" for the lawyers of Texas. The definition was this:

DR 2-101. Publicity and Advertising

(A) A lawyer shall not make, on behalf of himself, his partner, associate, or any other lawyer, any false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it:

(1) Contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

Meanwhile, perhaps without being sure of what was transpiring in Texas, the Federal Trade Commission was proceeding in a different direction. Chairman Miller proposed to Congress to redefine § 5 of the Federal Trade Commission Act so as to give this meaning to a "deceptive act or practice": ". . . a material representation that: (a) Is likely to mislead consumers, acting reasonably in the circumstances, to their detriment; or (b) The representor knew or should have known would be misleading."

I do not know how far the FTC has come with this recommendation. However, I can envision problems which will arise if the Act is amended and regulations adopted in conformity with this definition . . . because the definition with respect to lawyer advertising is different from that which the Supreme Court of Texas has provided for under its admendment to out Texas Disciplinary Rules.

In my view at least, as applied to advertising, the present rule in Texas is superior. In the case of misrepresentations in advertising, absent proof of detriment to the consumer, the misrepresentation under the FTC definition could be challenged only if the enforcing agency could show there was scienter of if the representor ". . . should have known (that the advertisement) would be misleading." Since this requires the enforcing agency to prove something that subjectively went on in the mind of the advertising attorney, it seems unlikely there could be much enforcement under the FTC definition. I can assure you that no grievance committee in the world, composed of volunteers of whom one-third are laymen, will take on the personal responsibility of seeking to enforce advertising regulations of the FTC kind at their own risk.

But that really begs the question. Regardless of whether the definition adopted by the FTC or by the Texas Supreme Court is the superior one, one can forsee and should face the fact that there will be an inevitable collision between federal and State regulatory power. If the FTC has jurisdiction to enforce its own regulations upon the State Bar of Texas and upon the State agency known as the State Bar of Texas, then the question arises as to whether or not federal power preempts the powers of the Texas Supreme Court to regulate lawyers.

This example can lead to only one unhappy conclusion—which is more litigation of the most unprofitable kind; that is, jurisdictional litigation between State and federal regulatory bodies in which the consumers and the lawyers are caught in the middle.

This is but one example, but it does not require much imagination to think of others.

Recognizing that federal regulation is appropriate in some areas, in the case of integrated Bars like our own, the danger of preemption by federal action presents a dangerous intrusion into the balance of powers between federal and state governments. It threatens to upset a balance and create a Constitutional crisis which we do not believe was ever intended by Congress.

Like the Texas witnesses who have preceded me before other Congressional committees, I urge you, therefore, to clarify your legislative intent regarding the FTC's authority to expand its regulatory domain beyond business enterprises and private associations to include public functions of the State. We do not need this sort of a Constitutional confrontation and, in a time of unbalanced budget and overburdened court dockets, there is no occasion to have one.

I urge you that the Texas Supreme Court is fully capable of regulating lawyers, Bar associations, and the practice of law in the State of Texas, that it is in fact doing so and that you should limit federal regulatory jurisdiction insofar as concerns states with integrated Bar associations, unless and until Congress speaks affirmatively to the contrary.

Thank you for this opportunity to speak.

AMERICAN INSTITUTE OF ARCHITECTS,
WASHINGTON, D.C., *March 16, 1983.*

Hon. BOB PACKWOOD,
Chairman, Commerce, Science, and Transportation Committee,
U.S. Senate, Washington, D.C.

DEAR SENATOR PACKWOOD: The Congress has examined the issue of regulating the professions on a number of occasions. As the Commerce Committee hold hearings on the Federal Trade Commission authorization for FY 84, I would like to relay the position of The American Institute of Architects on the matter of regulating professionals.

The American Institute of Architects does not believe that professionals, including architects, are above regulation at the federal or state level. Accordingly, during the 97th Congress, the AIA supported the Broyhill-Florio amendment to H.R. 6995, the Federal Trade Commission authorization bill. This amendment would have continued FTC authority over professionals, but would have required the FTC to take into account the benefits of any challenged professional practice to *public health, safety and welfare*. Under currrent law, consideration of professional standards is rigidly limited to their effects on competition alone. Unfortunately, the Broyhill-Florio amendment was defeated, and no authorization bill was passed.

The AIA believes that the FTC should not be empower to *overide* duly enacted state statutes and regulations affecting professionals. Reasonable regulation at the state and federal levels is in the public interest, and we do not believe that professionals should have a wholesale exemption from antitrust laws. However, under those same antitrust laws, the social value of a professional practice in relation to any commercial restraint which arises out of a professional standard, should be weighed carefully. There should be a more thorough examination of the benefits to the consumer of self regulation by professional groups. Public health, safety and welfare, must be put into any regulatory equation which affects the professions.

We ask you to consider our position.

Sincerely,

ROBERT BROSHAR, FAIA, *President.*

AMERICAN RETAIL FEDERATION,
Washington, D.C., March 22, 1983.

Hon. ROBERT W. KASTEN, Jr.,
Chairman, Consumer Subcommittee,
Washington, D.C.

DEAR MR. CHAIRMAN: The American Retail Federation respectively requests that its views with respect to the reauthorization of the Federal Trade Commission, as enclosed herewith, be incorporated into the hearing record on this matter.

Insofar as they remain generally pertinent to the issue, the Federation's comments of April 8, 1982 to the Senate Subcommittee on Consumer are attached.[1] Also attached is a document circulated by the Federation to all members of the House late in the 97th Congress, setting forth the retail industry's position on the major issues in the legislation. Please note that the latter document includes the Federation's support of a two-house legislative veto over FTC rules, as set forth in the FTC Improvements Act of 1980.

Sincerely,

DONALD F. WHITE.

Enclosures.

FEDERAL TRADE COMMISSION REAUTHORIZATION—RETAILING'S POSITION

Retailers believe that Congress should, as part of the reauthorization process, consider several substantive amendments to the FTC Act.

1. Legislative veto

Retailers support enacting into permanent law the two house legislative veto over FTC rules now contained in the FTC Authorization Act, set to expire soon.

2. Definition of "Unfair Practices"

Retailing supports the inclusion in the FTC Act of a definition of "unfair" practices, a term not now defined. This would provide those subject to the act with guidance as to the meaning the vague and fluid concept of unfairness. We support the definition advocated by FTC Chairman Miller (and incorporated into Senator Kasten's FTC bill, S. 2499) which defines "unfair" practices as those which: cause substantial consumer injury which is not reasonably avoidable and is not outweighted by consumer or competitive benefits.

3. "Back door Rulemaking" (FTC Act, section 5(m)(1)(B))

Retailing supports amending the Act to repeal of the FTC's present authority to seek penalties against a company based on violations of a "cease and desist" order issued against another company. This technique allows the FTC in effect to develop rules of industry-wide applicability in proceedings in which only the views—and conduct—of a single industry member are considered.

Alternatively, if this authority is retained, it should be limited to litigated orders, as opposed to consent agreements, and should incorporate the due process safeguards recognized by the court in *U.S.* v. *Braswell* (CCH 1981-2 Trade Cases, § 64,325, N.D. Ga. 1981). Those safeguards include the right of a firm charged with violating an order obtained against another firm, to show that the FTC's views as to the lawfulness of the conduct were incorrect, or that diffrent factual circumstances exist.

4. Jurisdiction over professionals

Retailers oppose efforts to deprive the FTC of its jurisdiction to regulate the business practices of professionals. The FTC has used its authority in this area judiciously and effectively, and consumers have benefited by the competition the FTC has encouraged. Retailers believe that an elimination of FTC authority to regulate anticompetitive practices by professional group would result in a decreased availability or needed services and higher consumer prices, while providing no offsetting safety or health benefits.

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[1] The testimony referred to was printed in the record of the committee's March 18-19, 1982, hearing on the "Reauthorization of the FTC" (Serial No. 97-108).

5. Civil penalties

Retailers support the inclusion of a statutory "cap" on civil penalties for a single violation of the FTC Act. We advocate a $500,000 ceiling, comparable to that of the Consumer Product Safety Act.

NATIONAL ASSOCIATION OF FEDERAL CREDIT UNIONS,
Washington, D.C., March 23, 1983.

Hon. ROBERT W. KASTEN, Jr.,
Chairman, Consumer Subcommittee,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: On behalf of the National Association of Federal Credit Unions (NAFCU)—the only national organization exclusively representing the interests of credit unions chartered by the federal government—I would like to address a matter of concern to the members of this Association.

When the Federal Trade Commission Act was enacted in 1914, banks were specifically exempted from the regulatory and investigative authorities of the newly-created Commission because they were already regulated by the Federal Reserve Board. Savings and loan associations were granted a parallel exemption in July, 1979, by the enactment of Public Law 96-37. Thus, Federal credit unions are the only type of federally chartered depository institution regulated by the Federal Trade Commission.

I respectfully request that you support an exemption for Federal credit unions from Federal Trade Commission jurisdiction similar to the exemption which presently exists for banks and savings and loan associations. As you know, Section 15 of the "Federal Trade Commission Amendments Act of 1982" (S. 2499), which was favorably reported by the Committee in the last Congress, provided for such an exemption.

The precedent for exempting Federal credit unions from Federal Trade Commission jurisdiction is well established. In addition, such an exemption would eliminate unnecessary, costly and duplicative regulation of Federal credit unions, which is a stated objective of the Financial Regulation Simplification Act of 1980 (Title VIII, Public Law 96-221). NAFCU suggests that the National Credit Union Administration, which is the independent agency of the federal government with primary responsibility for the regulation, supervision and examination of Federal credit unions, should regulate Federal credit unions with respect to consumer protection matters and most areas of antitrust, rather than the FTC.

We presented this proposal in testimony before the Senate Committee on Banking, Housing and Urban Affairs in May of 1981 when that Committee held hearings on competition and conditions in the financial system. Also appearing at those hearings were representatives of the National Credit Union Administration and the Federal Trade Commission.

Regulators support exempting Federal credit unions from FTC jurisdiction

Regarding our proposal to exempt Federal credit unions from FTC jurisdiction, the Honorable Lawrence Connell, then Chairman of the National Credit Union Administration Board, stated:

"Section 18(f)(1) of the Federal Trade Commission Act provides that the Federal Reserve Board has the authority to promulgate similar regulations for banks when the FTC issues a Trade Regulation Rule affecting banking or finance areas. The Federal Home Loan Bank Board was provided similar authority for savings and loan associations. We ask the Committee to consider granting the same authority to NCUA, so that Federal credit unions and their members will have the benefit of trade regulations that have been carefully considered by their supervisory agency."

When requested present the views of the Federal Trade Commission on this suggestion, Ms. Linda Colvard Dorian, Deputy Director of the FTC's bureau of competition, commented:

"The Commission supports a provision similar to that contained in Section 18(f) of the Federal Trade Commission Act, giving the National Credit Union Administration authority to issue trade regulation rules prohibiting unfair or deceptive practices by federally insured credit unions. The same reasoning which led the Congress to adopt this approach for savings and loan institutions insured by the Federal Home Loan Bank Board in Public Law 96-37 appears applicable to credit unions."

On April 6, 1982 the present Chairman of the National Credit Union Administration Board, Edgar F. Callahan, wrote to me in regard to NAFCU's efforts to exempt Federal credit unions from the jurisdiction of the Federal Trade Commission. In his letter Chairman Callahan wrote:

". . . concerning NAFCU's efforts in exploring the possibility of exempting Federal credit unions from the jurisdiction of the Federal Trate Commission. . . . I am very supportive of efforts to eliminate such duplicative regulations and can state that this agency is prepared to ensure proper compliance in such matters. Therefore, I certainly would encourage your continued efforts in obtaining amendatory language to the Federal Trade Commission Act. . . ."

As you know, on May 28 of last year the Senate Committee on Commerce, Science and Transportation ordered reported the "Federal Trade Commission Amendments Act of 1982" (S. 2499). Section 15 of S. 2499, if enacted into law, would have provided Federal credit unions with an exemption from Federal Trade Commission jurisdiction parallel to that enjoyed by commercial banks since 1914, and savings and loan associations since 1979. While final consideration of S. 2499 was deferred because of concerns unrelated to the Federal credit union exemption, Federal Trade Commission Chairman James C. Miller III, in testimony before that Committee last Wednesday noted that:

". . . since other financial institutions which are subject to the primary jurisdiction of other federal agencies have been removed from Commission jurisdiction, a majority of the Commission feels that it would be consistent to place credit unions which are regulated by the National Credit Union Administration, on the same footing."

On behalf of the members of the National Association of Federal Credit Unions (NAFCU), I ask that you and your colleagues in the Senate view favorably the proposal to exempt Federal credit unions from the jurisdiction of the Federal Trade Commission (FTC) to the extent enjoyed by the banks since 1914 and savings and loan associations since 1979. I believe that such an exemption should properly be viewed by you and your colleagues in the Congress as noncontroversial.

Credit union members share a common bond

I would point out that credit unions, unlike any other type of regulated depository institution, are prohibited by statute from serving the general public. Rather, every credit union's charter spells out quite clearly what the "field of membership" of that particular credit union might be. Every individual falling within a credit union's "field of membership" must share a "common bond" with other potential members. Each credit union's common bond will differ, but in every instance, it will be defined by either occupation, association, or a well defined geographical boundary. For example, not any resident of the District of Columbia is entitled to become a member of the Senate Employees Federal Credit Union. To become a member of the Senate Employees Federal Credit Union, an individual must either be an elected member of the United States Senate or work in the Senate.

The fact that credit unions, by statute, are prohibited from serving the general public accounts for the increased level of merger activity in recent years. During a recessionary period, one can anticipate an increased level of credit union merger activity, since many credit unions are composed of individuals who are employed by a common employer. When corporations, confronted by economic realities, seek merger partners, it is not uncommon for the credit unions which serve the employees of the respective corporations to be merged as well. Such a merger preserves the integrity of all the parties involved.

For purposes of illustration, assume that a Constitutional amendment was passed which would abolish our present bicameral form of government and replace it with a unicameral form of government. At present, both the Senate and the House of Representatives have credit unions which meet the needs of the members and staff of the two respective chambers. Should the bicameral form of government be abolished, it would simply make sense to merge the two credit unions which presently serve the two chambers, rather than go through the expense and administrative nightmare of liquidating one, in order that the members might join the other. These types of mergers occur frequently, tracking the corporate mergers of sponsoring businesses.

Number of credit union mergers: 1973–82

During the ten-year period extending from 1973 to 1982, there were on an average 239 credit union mergers per year which were conducted under the supervision of the National Credit Union Administration. As is the case with all regulated depository institutions, the volume of merger activity has increased somewhat in recent years, as indicated below:

Year:	*Number of mergers*
1982	633
1981	333
1980	313
1979	193
1978	196
1977	195
1976	198
1975	196
1974	76
1973	54

Challenges of credit union mergers

Having consulted with officials of the Executive Office of the Antitrust Division of the Department of Justice and also with the Office of General Counsel of the National Credit Union Administration, I am able to report to you that despite the substantial level of credit union merger activity in recent years, there is not a single reported case of any federal agency ever challenging a credit union merger on antitrust grounds. This is a commendable record, of which the National Credit Union Administration should be justifiably proud.

Retention of Justice Department jurisdiction

NAFCU's Legislative Counsel, having studied the proposal to exempt Federal credit unions from the jurisdiction of the FTC, assures me that there is nothing in this proposal which would alter the authority of the Justice Department to bring a cause of action in the event that the Department wished to challenge a credit union merger at any future date, should the exemption be enacted into law. In addition, officials of the Executive Office of the Antitrust Division of the Department of Justice have assured me that just as the Department retained jurisdiction over savings and loan associations following the enactment of Public Law 96-37, so would the Justice Department retain similar jurisdiction over credit unions should a parallel credit union exemption be enacted into law. Indeed, as far as this point is concerned, I would remind you and your colleagues that the Department of Justice has never challenged a credit union merger approved by the National Credit Union Administration Board. Also indicative of NCUA's anticompetitive effort and concern is the fact the Justice Department's views are obtained whenever deemed desirable.

It is my understanding that whenever the National Credit Union Administration considers the approval of credit union mergers, NCUA requires staff consideration of the economic impact and legality of a proposed merger as a precondition to consideration for approval. The National Credit Union Administration for years has reviewed merger applications in light of the antitrust laws and ensured compliance with those statutes in order to obtain approval of a merger application.

Conclusion

Mr. Chairman, I would once again ask that you and your coleagues in the Senate view favorably language similar to that contained in Section 15 of the "Federal Trade Commission Act Amendment of 1982" (S. 2499) exempting Federal credit unions from the jurisdiction of the Federal Trade Commission (FTC) to the extent banks have been exempted since 1914 and savings and loan associations since 1979. As the record clearly indicated, credit union mergers have historically been administered in a highly responsible manner.

Congressional enactment of such an exemption would also conform to the findings contained in Title VIII of Public Law 96-221:

"The Congress hereby finds that many regulations issued . . . often impose costly, duplicative and unnecessary burdens on both financial institutions and consumers. . . . Regulations should achieve legislative goals effectively and efficiently. Regulations should not impose unnecessary costs and paperwork burdens on the economy, on financial institutions, or on consumers."

As the record indicates, the National Credit Union Administration must regulate the credit union industry. It must police the industry comprehensively, intensely and continuously. It must, and does, exercise its powers in plenary fashion for the protection of the member-owners of credit unions. While the interest and efforts of the FTC in preventing or eliminating unfair trade practices are to be encouraged, at the same time, the resources of the National Credit Union Administration may be used more effectively than those of the FTC in the very area where NCUA has special expertise and is in a particularly effective position to make a contribution.

NAFCU, therefore, urges you and your colleagues in the Congress to provide Federal credit unions with a parallel exemption from the jurisdiction of the Federal Trade Commission similar to that presently granted to commercial banks and savings and loan associations. To do otherwise would perpetuate inefficiencies in government regulation as well as special interest exemptions from the broad application of Federal Trade Commission rulemaking and enforcement authority.

Senator Kasten, if you desire any further information relating to this or any other matter of conern to your credit union constituents, please do not hesitate to contact me or NAFCU's director of government affairs and federal legislative counsel, Bill Donovan, at 522-4770.

MAL NESTLERODE,
Executive Vice President.

NATIONAL CONSUMERS LEAGUE,
WASHINGTON, D.C., *March 23, 1983.*

Hon. BOB PACKWOOD,
Chairman, Committee on Commerce, Science, and Transportation,
U.S. Senate, Washington, D.C.

DEAR SENATOR PACKWOOD: As the Senate Committee on Commerce, Science and Transportation works toward the reauthorization of the Federal Trade Commission, the National Consumers League urges Committee members to bear in mind three specific issues of concern to the League that relate to the FTC effectively carrying out its mandate:

The League urges that federal funding for the FTC for FY 84 not fall below those levels approved by the Committee in last year's reauthorization legislation, and that there be a line item earmarking sufficient authorized funds for the operation of the FTC's ten regional offices at adequate staffing levels;

The League supports continuation of the FTC's statutory authority to provide a program of public participation in administrative rulemaking as established by Congress under the 1975 Magnuson-Moss Act and as provided for in the 1980 FTC Improvements Act;

The League opposes any legislative effort to re-enact so-called fair trade laws that for years protected the monopolistic business practice of re-sale price maintenance.

FTC FUNDING

In fiscal year 1980, the FTC budget, as proposed, was $80 million, By fiscal year 1984, federal funding for the FTC, as proposed by the OMB, would decline below $60 million. In the past three years, the FTC budget and personnel have been reduced 25 percent and personnel in the regional offices has been reduced by 56 percent. The FTC cannot perform its overall enforcement responsibilities on a budget below present levels, and would be crippled at levels below $60 million.

Although the immediate threat to close four FTC regional offices has passed, substantial staff layoffs in those offices are occurring at this very moment. On January 28, 1983, FTC Commissioner James Miller wrote to the House and Senate Appropriations Subcommittees requesting authority to re-organize the FTC and close four regional offices. Both subcommittees rejected that request and instead required that the Commission maintain a viable program of FTC enforcement in each office. The chairmen of the subcommittees, however, left Chairman Miller discretion to make personnel cuts. As a result, the Chicago and New York offices are being cut in size by approximately 50 percent, while the Cleveland and San Francisco offices are suffering a 25 percent staff loss. At proposed OMB funding levels for fiscal year 84-85, further drastic reductions in the regional offices, including the likely closing of several offices, would be necessary. Maintaining only a skeletal staff in the regional offices, is particularly bothersome to the League. Let me explain my point.

Senator John Heinz, Chair of the Senate Select Committee on Aging, held hearings on March 1 and released the findings of a consumer fraud survey initiated by the Committee in July 1982. The survey was sent to approximately 1500 state attorneys general, district attorneys, consumer affairs offices and chiefs of police in large and small cities across the country. Over 40 percent responded to the survey, and the indications are that economic victimization of the elderly is a significant and growing problem. The FTC regional office is a federal resource for complaint handling and investigation of deceptive practices.

The Committee survey shatters the myth that consumers in general and, in this case, older Americans in particular no longer need the vigorous support of government law enforcement to police unfair and deceptive business practices. Among the top ten frauds foisted upon the elderly, seven are on the Federal Trade Commission's agenda. They include health-related frauds, housing and land fraud, nursing home problem, automobile sales fraud, business opportunity and investment fraud, and funeral industry practices. The survey finds that frauds against the elderly are increasing while resources to combat fraud are diminishing. The continued decline in federal funding, particularly in the regional offices—the backbone of FTC enforcement in many of these areas—means that it is unlikely that the FTC will be able to meet its responsibility as a vital federal resource to help combat exploitation of older Americans. Currently, the FTC appears committed to priorities, policies and budget allocations that deflect resources away from enforcement action that could bring relief to distressed senior citizens.

A recent Lou Harris poll on "Consumerism in the 80's" surveyed more than 1200 individuals in October 1982. Although 39% of the respondents rated the FTC performance as fair or poor while only 26% thought the FTC deserved an excellent rating, more than 60% of the respondents thought that government had not done enough to protect consumers against dangerous products, inadeqaute guarantees and warranties, and against companies that fail to live up to their advertising claims. Hardly any support at all was found for dismantling consumer protection and weakening existing enforcement authority.

PUBLIC FUNDING FOR PUBLIC PARTICIPATION

The League urges that the FTC's statutory authority to compensate public witnesses in agency rulemaking be extended and that funding for the program be maintained according to the language of the 1980 FTC Improvements Act.

The FTC established the first major and most successful public participation program in the federal government. At its inception in 1975, the FTC program became a model of how agency decision-making can be more responsive and open to public views and citizen needs.

The central focus of successful public participation programs is that the presentation by individuals, small business and citizen groups can contribute to a full and balanced consideration of important public issues. A goal of citizen participation should be to learn public views on issues prior to governmental decision-making that affects people's lives. For several years, this FTC program enjoyed strong bipartisan support.

Our democratic system of government was founded on the principles of citizen participation. Public funding for public participation is a modest investment in the first amendment principle that citizens have a right to express their views to their government.

RESALE PRICE MAINTENANCE

Consumers do not need higher prices, they need lower prices. Since 1975, when Congress repealed the Miller-Tydings Act that exempted re-sale price maintenance agreements between manufacturers and retailers from federal anti-trust laws, retail discounting has thrived. Prices for many consumer goods dropped dramatically, and discounting became a frequent practice for stereos, radios, luggage, clothing, and other consumer items. The law concerning re-sale price fixing agreements is clear. Six months ago, the U.S. Supreme Court re-affirmed the law and stated that price fixing is a per se violation of the law.

The current chairman of the Federal Trade Commission apparently disagrees with per se enforcement and has refused to permit the FTC to bring about action to enforce the law against re-sale price maintenance practices. As a result, since 1981, the FTC has not brought a single new prosecution of any company suspected of engaging in price fixing. While the FTC chairman has refused to uphold the law, the U.S. Assistant Attorney General in charge of the Anti-Trust Division at the Justice Department is reported to be drafting a bill to legalize once again re-sale price maintenance agreements, this time under a "rule of reason" test. This test, were it enacted, could increase the cost, necessary time, and difficulty in stopping such an agreement and preventing the economic injury it caused.

It appears that the FTC chairman and the U.S. Attorney General believe as a matter of economic idealogy that this form of retail price fixing harms no one. Consumers are more practical and know better. The know that when retailers agree not to sell goods below a manufacturer-specified price, that consumers are the ones who will be paying the higher prices. This kind of collusion can only add to the inflation of a family budget and to a rise in the consumer price index.

The National Consumers League urges you to oppose any legislative attempt to legalize again re-sale price maintenance agreements. We further hope that you will communicate with the Department of Justice and the Federal Trade Commission to let them know that Congress expects the law to be enforced.

As you know, the National Consumers League began in 1899 and has a long and unique history. The League has demonstrated repeatedly its willingness to fight for worker and consumer rights and to ensure the enforcement of laws enacted to protect those rights. As the League's Executive Director, I look forward to working with you, the Committee and your staff to make the FTC a more viable protector of consumer and worker rights in a complex marketplace.

Sincerely,

BARBARA F. WARDEN,
Executive Director.

THE PROPRIETARY ASSOCIATION,
Washington, D.C., March 31, 1983.

Hon. BOB PACKWOOD,
Chairman, Committee on Commerce, Science, and Transportation, Russell Senate Office Building, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: The Proprietary Association—the 102-year-old national trade association which represents the manufacturers of nonprescription (OTC) medicines—is pleased to submit for inclusion in the official record on the Federal Trade Commission reauthorization and oversight hearings conducted on March 16, 17 and 18, 1983, the statement contained herein.

The FTC Improvements Act of 1980 contained important provisions that have been temporarily extended and are now scheduled to expire on September 30, 1983. The temporary provisions that affect the Commission's regulation of commercial speech which were adopted after careful consideration, should be made a permanent part of the FTC Act. In addition, it is important that certain related amendments be made in the Act to guide the Commission's regulatory initiatives in the commercial speech area.

The controversy that preceded the FTC Improvements Act of 1980, and convinced the Congress that changes in the Commission's jurisdiction were needed, focused largely on Commission activities affecting commercial speech. The hearings that resulted in the FTC Improvements Act provide overwhelming evidence of the need to limit the Commission's use of an unfairness rationale to ban truthful commercial speech and of the importance of the Commission's promulgating, at the beginning of any TRR proceeding, the text of the rule it proposes to adopt. The children's advertising proceeding provided the most dramatic and publicized, but by no means the only, illustration of the need for these provisions.

The concerns that were crystallized by the children's advertising proceeding led to the adoption of a moratorium on any new rulemaking initiatives premised on an unfairness theory. That moratorium, which is scheduled to expire on September 30, 1983, should be made a permanent part of the FTC Act. Since the policy considerations justifying a ban on use of an unfairness theory in commercial speech rulemaking extend equally to adjudicatory proceedings under Section 5 of the FTC Act, we also believe that the phrase "unfair * * * acts or practices," appearing in Section 5 of the FTC Act, should be defined expressly to exclude commercial speech.

Further, in light of the constitutionally protected status of commercial speech, and of the significant differences in meaning that may derive from the context in which particular commercial speech occurs, we believe that Section 5(m)(1)(B) of the FTC Act should be amended to prevent the Commission from seeking to apply and enforce orders against persons who were not respondents in the original administrative proceeding.

None of the recommendations we have made would require, of themselves, suspending or ending the antacid warnings proceeding, which was initiated in 1976 and remains of immediate concern to The Proprietary Association and its members. It should be noted, however, that the antacid proceeding was based in substantial part on an unfairness theory that had been fashioned by the Commission staff—and that the policy considerations justifying a ban on new rulemaking proceedings based on an unfairness rationale apply with full force to the antacid proceeding.

Moreover, the antacid proceeding, like the children's advertising proceeding, was initated without a proposed rule. The Commission's own presiding officer acknowledged in his report that, as a consequence, "much of the testimony [in the proceeding was] largely focused[,] * * * deal[t] largely in theoretical concepts or considerations and, for this reason, poses a problem in attempting to evaluate it for its value to this rulemaking * * *." The presiding officer also stated that, on the basis of the record in the proceeding, the imposition of a "product-specific" warning requirement represented a "bleak prospect."

Since the hearings phase of the antacid warnings proceeding was concluded prior to adoption of the FTC Improvements Act, the provision of that Act requiring the promulgation of a proposed rule at the outset of any TRR proceeding does not technically require the suspension of that proceeding. But, again, the policy considerations underlying the requirement of a proposed rule clearly apply to the antacid proceeding. Indeed, as was emphasized in a colloquy among Senators Ford, Danforth, and Warner, who managed the 1980 Improvements Act during Senate floor consideration, the Commerce Committee's expectation was that the Commission would "take a close look at the [antacid] proceeding—particularly those problems associated with the failure to propose a rule at the outset of the proceeding."

For all of these reasons, we are hopeful that the Commission will recognize the widsom of ending the antacid proceeding once it has had an opportunity to consider the issues raised there.

We appreciate this opportunity to present these views and hope that this information will be helpful to the Committee during its deliberations on the Federal Trade Commission.

Sincerely,

DANIEL F. O'KEEFE, Jr.

ASSOCIATION FOR THE ADVANCEMENT OF PSYCHOLOGY,
Washington, D.C., April 4, 1983.

Hon. BOB PACKWOOD,
Chairman, Commerce, Science, and Transportation Committee,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: We are writing to express our concerns about threats to either limit or abolish the Federal Trade Commission's (FTC) jurisdiction over the professions. The Association for the Advancement of Psychology (AAP) and the American Psychological Association (APA) represent over 65,000 psychologists across the nation and are "dedicated to the advancement of psychology as a science, as a profession and as a means of promoting human welfare." We stand opposed to any attempts to restrict the FTC's ability to enforce antitrust and and consumer protection laws established under the FTC Act.

During the 97th Congress, the FTC survived the most intense and best financed assault on antitrust authority in the nation's history. Led by the American Medical Association (AMA) and its considerable financial resources, this congressional assault was intended to exempt all state-credentialed professions from the purview of the FTC. The psychology community—APP and APA—took an active part in opposition to these AMA efforts in 1981 and 1982. We worked through a broad-based coalition of over 34 national organizations representing health care professionals, consumer groups, public interest groups, women's organizations, business leaders, and labor groups.

The result of these efforts was the defeat of the AMA-backed legislation in the final hours of the 97th Congress. Despite the massive effort of the AMA, and despite the millions of dollars spent by AMA in support of the legislation and its sponsors, the public good prevailed over private interests. It is certain that organized medicine is trying again to curtail the reasonable authority of the FTC. This time, however, the AMA is attempting to appear more reasonable in their approach by purporting to support a compromise position. As you will recall, the AMA rejected two different legislative compromises that were offered last session. We urge your thorough consideration of any proposed compromise, and an analysis of its according to public interest needs rather than special interest desires.

The most important issue, we believe, is that the medical profession is currently in a position to control or monopolize the market for their services (and related services). Groups of physicians, nonprofit associations of physicians, and corporations controlled by physicians have actively worked to control, restrict, or deny the professional practice of psychology by psychologists.

Psychologists are credentialed in all 50 states and the District of Columbia as practitioners of clinical services, are recognized in most federal health-related laws, are members of the faculty in every U.S. medical school, are required by state law to be reimbursed for their services by health insurance companies in 38 states (representing over 87 percent of the U.S. population).

Despite a clear market for psychological services and recognition of their efficacy by consumers and state and federal governments, organized medicine is almost un-failing in its efforts to deny access to psychologists by the public. They have acted to prevent the granting of hospital staff privileges to psychologists, to prevent group practice between physicians and psychologists, to deny health insurance reimbursement to psychologists at the state and federal levels, and to enact "physician supervision" or "physician-only billing" requirements for psychological services.

These multiple ways of keeping psychologists out of the competitive market sometimes take the form of state laws, sometimes private agreements, and sometimes the corporate policies of health-related organizations. They are almost always, however, the result of advocacy by the medical establishment. Organized medicine simply does not want nonphysician practitioners interfering with the monopoly of medical practice.

Another reason psychology supports clear authority for the Federal Trade Commission and strong enforcement of the antiturst statutes is the progress that has been made thus far. The FTC investigation of physicians' control over the Blue Shield organizations across the country has resulted in a new awareness of potential conflict of interest in health insurance programs. The suit by the Ohio Attorney General against the Joint Commission on Accreditation of Hospitals has put JCAH and its parent groups on notice that monopolistic practices will result in law suits. The efforts by the Virginia Academy of Clinical Psychologists and Carol McCready against Virginia Blue Shield has shown the nation that psychologists and their clients can be tenacious—and victorious—in defending their legal rights to third-party payment for psychological services.

A third reason for psychology's defense of the FTC is the length and breadth of the battle that organized medicine is willing to face to preserve its hold on health care. A move to state legislatures to amend antitrust laws—a move already endorsed by the AMA—could present an extremely serious challenge to the public interest—a challenge made by well-financed and organized state medical societies. The economic power of the AMA and it's multimillion dollar political action committee connot, currently, be even approached by organized psychology's resources. The medical mystique and natural support that physicians hold will probably never be matched by any other group of health care practitioners. Therefore, as antitrust efforts continue, nonphysicians need the assistance and the leadership of agencies such as the Federal Trade Commission.

The professional and economic challenges to psychologists posed by organized medicine have been stymied in the past by the Federal Trade Commission and by strict enforcement of the antitrust laws. Now that professional competition and consumer choice are being supported in the courts, the American Medical Association is redoubling its efforts to retain a monopolistic hold on health care, hospital practice and health insurance throughout the nation. Organized psychology, with the help of its friends in other professions and in the Congress, has barely held the line against politically and enonomically stronger forces.

We, therefore, urge your consideration of our views in the reauthorization of the Federal Trade Commission during the 98th Congress. As in previous communications with this subcommittee, psychology continues to support the FTC's jurisdiction over the professions and we oppose any restrictions of this authority that would allow professions and their associations to circumvent valid and valuable law. We believe that the preservation of the FTCs enforcement of consumer-oriented and pro-competitive laws is an absolute necessity in ensuring competition among professional in the health care marketplace.

The psychology community greatly appreciates this opportunity to express its views on this issue of critical importance.

Sincerely yours,

CLARENCE J. MARTIN,
Executive Director and General Counsel.
MICHAEL S. PALLAK, Ph. D.,
Executive Officer.

CREDIT UNION NATIONAL ASSOCIATION, INC.,
Washington, D.C., April 5, 1983.

Hon. ROBERT W. KASTEN, Jr.,
Chairman, Consumer Subcommittee,
U.S. Senate, Washington, D.C.

DEAR SENATOR KASTEN: The Credit Union National Association, Inc. (CUNA) appreciates the opportunity to submit these comments for the record supporting the proposal to amend the Federal Trade Commission Act to transfer the jurisdiction for regulating unfair and deceptive practices of federal credit unions to the National Credit Union Administration. CUNA represents over 20,000 state and federally chartered credit unions through 52 member credit union leagues. The nation's credit unions serve more than 47 million Americans.

CREDIT UNIONS ARE UNIQUE

Credit unions are non-profit, member-owned, cooperative financial institutions. Membership is limited to persons within a field of membership—employment, association or residence within a well-defined geographic area. Credit unions are democratically controlled with each member of the credit union having one vote, regardless of the number of dollars in shares at the credit union. As democratically controlled financial cooperatives, the consumer orientation of credit unions is insured. These unique financial cooperatives return to their member-owners every penny of income earned in excess of operating expenses, required reserves and necessary undivided earnings transfers. More than 47 million consumers have joined credit unions because they offer loans at reasonable rates and offer a high rate of return on member savings.

The Federal Credit Union Act establishes a statutory framework that ensures the unique nature of federal credit unions. The key statutory feature includes:

A common bond among members.

One vote per member and prohibition on proxy voting.

Non-profit status without capital stock.

Statutory reserves.

The Federal Credit Union Act, adopted in 1934, has remained fundametally unchanged during the past half century. Several new powers and growth in assets and membership have not altered the basic structure, purpose and goals of federal credit unions—to make loans for provident and productive purposes and provide a safe place to save at a reasonable rate of return.

EXPERTISE OF NCUA

The National Credit Union Administration (NCUA) is an independent regulatory agency within the Executive Branch. Its status is similar to that of the Federal Trade Commission. The NCUA and its predecessor, the Bureau of Federal Credit Unions, have developed a body of regulatory expertise that matches the unique operational aspects of federal credit unions with considerations of safety and soundness while ensuring that members are treated fairly.

NCUA performs these regulatory oversight functions through its examiners and the issuance of regulations governing all areas of federal credit union operations. Throughout its history, NCUA and its predecessors have actively policed the activities of federal credit unions that would fall under the "unfair and deceptive" acts or practices standard otherwise delegated to the Federal Trade Commission in the FTC Improvement Act, P.L. 93-637.

AUTHORITY OF NCUA

Historically, NCUA has been very alert to "acts or practices" which depart from traditional methods of credit union operation. The Board is empowered by 12 U.S.C. 1766 to prescribe rules and regulations affecting all aspects of credit union operations. This authority relates not just to concepts of safety and soundness, but has from time to time been successfully used to support regulations structuring the relation between the credit union and its members. Examiners form the nucleus of the enforcement mechanism. The tools at their disposal, during their periodic inspections, range from moral persuasion, to the institution of cease and desist proceedings or office removal proceedings when other methods are unsuccessful. Enforcement of statutes, regulations, bylaws, orders and interpretations are all properly within the examiners' jurisdiction.

NCUA has additional power to prescribe rules and regulations under 12 U.S.C. §§ 1789 and 1786. The authority under § 1786 was greatly expanded in 1978 in P.L. 95-630. The clear legislative history states as one of its purposes, the provision of regulatory powers which allow the regulatory agencies to "tailor solutions and responses to specific problems." (Legislative History, P.L. 93-630, U.S. Code Congressional and Administrative News, 1978, p. 9288.)

It is CUNA's belief that these substantive regulatory powers allow NCUA to actively and effectively police the specific acts or practices it may find unfair or deceptive. The transfer of jurisdiction from the FTC to NCUA will prevent any question as to the authority of NCUA to regulate this aspect of federal credit union operation.

REGULATORY OVERLAP

NCUA currently exercises regulatory jurisdiction over federal credit unions in enforcing the Truth-in-Lending Act, Fair Credit Reporting Act, Fair Credit Billing Act, Equal Credit Opportunity Act and the Electronic Funds Transfer Act. Federal credit unions look to the FTC as a regulatory agency only for enforcement of FTC rules issued under the FTC Improvements Act, P.L. 93-630. This regulatory overlap is unnecessary. Logically, the agency with the greatest expertise with federal credit unions, the National Credit Union Administration, has been assigned regulatory responsibiity in almost all instances. The proposal merely rationalizes this regulatory system by giving clear regulatory authority over the unfair and deceptive acts or practices of federal credit unions to NCUA.

CONCLUSION

CUNA supports the proposed amendment and urges its adoption.

Respectfully submitted,

BRUCE O. JOLLY, Jr.,
Washington Counsel.

NATIONAL CREDIT UNION ADMINISTRATION,
Washington, D.C., April 6, 1983.

Hon. Robert W. Kasten, Jr.,
Chairman, Consumer Subcommittee,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: I am pleased to respond to your request for comments on a proposed amendment to the Federal Trade Commission Act which would exempt Federal credit unions from Federal Trade Commission jurisdiction to the same degree which banks and savings and loan associations have already been exempted. I am very supportive of this amendment which would eliminate the potentially duplicative regulatory scheme which currently exists.

Presently Federal credit unions are subject to both the jurisdiction of the Federal Trade Commission and the National Credit Union Adminstration with respect to investigatory and enforcement authority. In order to receive the same exemption which has previously been granted to banks and savings and loan associations, Sections 5, 6, and 18 of the Federal Trade Commission Act should be amended to exempt Federal credit unions.

The National Credit Union Adminstration is prepared to ensure proper compliance in such matters, and we concur that our authority under Section 120 of the Federal Credit Union Act (12 U.S.C. § 1766 and Section 206 of the Federal Credit Union Act (12 U.S.C. § 1786) is sufficient to protect the interests of Federal credit union members. NCUA will, of course, promulgate substantially similar rules to those promulgated by the Federal Trade Commission under Section 18(F) of the Federal Trade Commission Act unless we determine that such acts or practices are not unfair or deceptive with respect to credit unions.

I thank you for the opportunity to comment on this matter and would encourage your continued efforts in obtaining amendatory language to the Federal Trade Commission Act exempting Federal credit unions from the jurisdiction of the Federal Trade Commission.

Sincerely,

B. F. CALLAHAN, *Chairman.*

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